Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1995

TEAMSTERS UNION LOCAL NO. 115,
a/w INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,
Petitioner

and

HAROLD FISHER and JOSHUA JOHNSON,
Additional Petitioners

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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18 pp

QUESTIONS PRESENTED FOR REVIEW

1. Was the National Labor Relations Board entitled to invoke the civil jurisdiction of the federal court and, at the same time, refuse to comply with the discovery provisions of the Federal Rules of Civil Procedure?

2. Was it lawful to hold a union and its members in civil contempt of an order restraining the union from picketing activities coercive of "any" employer, where a) the finder of fact acknowledged there was no evidence the union had authorized, participated in or ratified the allegedly contumacious acts; and b) the court's sole justification for issuing such a broad restraining order in the first instance was that during three of the many strikes conducted by union members against various employers over nearly two decades, picketing violations by union members had occurred?

3. Did the imposition of a mandatory prospective fine schedule, without opportunity for a purge, render the contempt proceeding criminal in nature?

4. Was the heavy mandatory fine schedule, imposed without relation to the severity of the infraction and without opportunity for a purge, excessive by constitutional standards and violative of due process?

5. Did the intrusive discovery into union activities ordered by the Court of Appeals violate the due process and associational rights of the union and its members?

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REPORTS OF OPINIONS

The Court of Appeals did not issue an opinion in support of its contempt adjudication. Its memorandum opinion in support of the original restraining order was unreported. The divided decision of the National Labor Relations Board adopting the restraining order was reported at 275 N.L.R.B. 1547 (1985).

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals denying a rehearing was entered on August 31, 1995. Jurisdiction to review the said order by writ of certiorari is conferred on this Honorable Court by 28 U.S.C. § 1254(1). The jurisdiction of the Court of Appeals was premised upon 29 U.S.C. § 160(e).

CONSTITUTIONAL PROVISIONS INVOLVED

FIRST AMENDMENT

Congress shall make no law ... abridging the right of the people peaceably to assemble ...

FIFTH AMENDMENT

No person shall ... be deprived of ... liberty or property, without due process of law ...

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; ... and to have the Assistance of Counsel for his defence.

EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed ...

STATEMENT OF THE CASE

This matter has its origin in a 1984 labor dispute between petitioner Teamsters Local 115 and Gross Metal Products, Inc., a nonparty to the present proceeding. Gross Metal Products filed an unfair labor practice charge against the union, alleging picket line misconduct at its facility. The union and general counsel to the National Labor Relations Board ("the Board") agreed to a settlement whereby the union would desist from restraining or coercing the employees of Gross Metal Products, or of any other employer doing business with Gross Metal Products, by obstructing ingress and egress to the facility, threatening or assaulting employees, damaging property and mass picketing.

Gross Metal Products objected. The administrative law judge recommended that an order be entered directing the union to desist from restraining or coercing the employees of any employer.

By a 2-to-1 decision, a panel of the Board approved the recommendation. The dissenting member voted to enforce the settlement, because it "fully protects the Charging Party's interests" by "providing 'a broad remedy with respect to conduct at the Employer's facility'" and "effectuates the policies of the Act." Teamsters Local 115 and Gross Metal Prod., Inc., 275 N.L.R.B. 1547 (1985).

The Court of Appeals for the Third Circuit, in an unpublished memorandum opinion, entered the expansive order requested by the panel. To find support for its order, the Court had to look back nearly two decades, during which the union had engaged in numerous strikes and labor disputes.

The Court located a grand total of three cases of misconduct by union members. The most recent was eight years old. It involved a bargaining unit of only seven employees and an employer who was itself found guilty of unfair labor practices. Local 115, Int'l. Bhd. of Teamsters (Martin J. Sobol), 238

N.L.R.B. 1070 (1978). Nonetheless, the Court insisted that such isolated and limited "prior violations may support broad remedial orders," regardless of their "mere remoteness in time."

During the next eight years, not a single violation of the order was found or even alleged. The union's numerous strikes and labor disputes were conducted in full compliance with the order.

In 1992 and 1993, the union conducted five strikes which gave rise to charges by both the union and the employers. Upon the conclusion of three of the strikes, both the union and the employer moved to withdraw or dismiss all charges.

The Board refused to approve the withdrawal of the employers' charges. It instead referred them to the Board's contempt litigation branch, which initiated the present action by filing a petition with the Court of Appeals to have the union adjudicated in civil contempt.

On November 22, 1993, the matter was assigned to a Special Master for a hearing. A pretrial conference was scheduled for January 18, 1994. On January 10th, the Board and the union discussed pretrial discovery. The parties agreed to a mutual exchange of documents in accordance with the Civil Justice Expense and Delay Reduction Plan. The taking of depositions was discussed.

When the conference was cancelled due to inclement weather, the Special Master instructed the parties to file position statements. He also directed the parties to initiate discovery. The union maintained that it was entitled to be fully informed of the Board's allegations.

On March 24, 1994, the parties voluntarily exchanged certain documents. Instead of providing the affidavits it had taken from its witnesses, the Board submitted its "First Pretrial Disclosure Statement." The statement was, in essence, a witness list. It identified the witnesses the Board expected to produce at trial, without even disclosing the allegations regarding

which each witness was expected to testify.

The union promptly notified the Board that merely identifying its witnesses did not constitute compliance with the Plan. The union was entitled to discover witness statements, videotapes, incident reports and other relevant documents the Board had acknowledged were in its possession. In response to the Board's apparent noncompliance, the union also served a request for production of documents on the Board, specifically requesting witness affidavits and videotapes.

On April 7, 1994, the Master scheduled a conference for April 21, 1994 to resolve any discovery disputes. The following day, the Master notified the parties that the hearing on the contempt petition would begin on May 3, 1994.

The union promptly wrote a letter to the Master stating that the proposed hearing date was premature, because the union had not yet received any of the Board's witness statements and videotapes. Accordingly, the union had not had an opportunity to assess the relative importance of each witness and determine the depositions it would require.

On April 14, 1994, the Board responded. Although the Board was seeking an adjudication of civil contempt, it invoked a criminal statute known as the Jencks Act[1] and asserted that it was not required to provide the statement of any witness until after the witness testified on direct examination. The Board further asserted that it was not required to comply with the discovery provisions of the Federal Rules of Civil Procedure, because it did not apply them in its own administrative agency proceedings. It refused to acknowledge that, by electing to proceed in the federal court, it had bound itself to comply with the rules of its chosen forum.

On April 22, 1994, the union moved to compel production

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[1] P.L. 85-269, 71 Stat. 595, 18 U.S.C. § 3500.

of the documents it had requested. Without receiving a response from the Board, on April 28, 1994, the Master summarily denied the union's motion.

On May 21, 1994, the Board amended its petition for an adjudication of civil contempt. The Master continued the hearing for a mere two days.

On May 5, 1994, the hearing began. The Board eventually presented 33 witnesses to testify with respect to 56 allegations. In every instance, the statement of the witness was not given to the union until after the witness testified on direct examination.

On May 17, after three days of testimony, the union requested a stay to take discovery based upon the witness affidavits. The Master denied the motion, and the hearing continued.

On July 13, 1994, prior to the due date for post-trial statements, the union moved for the dismissal of all charges. It pointed out that the penalties demanded by the Board included a heavy prospective fine schedule, rendering the proceeding criminal in nature under United Mine Workers v. Bagwell, 114 S. Ct. 2552 (1994). The Court of Appeals denied the motion without comment on September 2, 1994.

The Special Master issued his report and recommendation on October 12, 1994. Although he acknowledged that the Board failed to show that the union had authorized, participated in or ratified any of the incidents, he concluded that its failure to prevent them constituted civil contempt.

The union was able to prove that it had issued written instructions to each picket, specifically directing all pickets not to threaten employees, block ingress or egress and engage in mass picketing and other enumerated conduct prohibited by the June 1986 order and the National Labor Relations Act. Although the Master adverted to the issuance of the instructions in his report (p. 33), he made no findings regarding their adequacy and compliance with the June 1986 order.

The union also demonstrated that any instances of member-

ship misconduct were isolated events which took place during the prolonged strikes and were promptly remedied. While the Master mentioned the union's removal of a noncompliant picket (pp. 31-32), he did not make findings concerning its compliance efforts.

Instead, he effectively applied a strict liability standard: because violations had occurred, the union must not have taken steps to prevent them. Ergo, it should be held in contempt. The union's evidence regarding its good-faith efforts to achieve compliance was ignored.

The Special Master summarily rejected all of the union's arguments. He dismissed the Board's refusal to comply with F.R.Civ.P. 34 (regarding the pretrial production of documents) as immaterial. With regard to the Bagwell issue, the Master stated that because it had been before the Court of Appeals when it considered the union's motion to dismiss the charges, he was not required to address it.

On January 13, 1995, the Court of Appeals issued an order adjudicating the union and two of the members (Fisher and Johnson) in civil contempt. The parties were directed to submit briefs addressing the appropriate remedy.

The Board demanded a prospective fine schedule of $10,000 per violation against the union and $1,000 for each day the violation continued. The Board further demanded fines of $1,000 per violation against each member and $500 for each day the violation continued. In addition, the Board demanded the union's membership list with addresses, copies of sign-in sheets from future picket lines and notification of the captains of future picket lines.

The union responded that the fines were criminal under Bagwell, entitling the union to a panoply of criminal protections it has not been given. In addition, the union pointed out, the fines were unwarranted and excessive. There was not a single instance of serious physical injury or substantial property damage. The various incidents complained of were limited to

blocking access, gluing locks and empty threats.

While each of the five strikes had lasted, on average, about six months, and the Board had access to over 1600 hours of videotape, it introduced only about one hour of videotape at the hearing. That was because the picket lines were reasonably peaceful for the most part. The occasional incidents of flared tempers were to be expected and did not evince a planned pattern of lawlessness.

Lastly, the union opposed the highly intrusive discovery into its activities proposed by the Board. As a matter of constitutional right, the bureaucratic convenience of the Board could not be given precedence over the associational rights of the union and its right and duty to fairly represent the interests of its members.

On July 20, 1995, the Court issued an order which, inter alia, imposed the prospective fine schedule proposed by the Board. In addition, the Court granted the Board's demand that the union produce its membership lists, maintain sign-in sheets at all future picket lines, designate picket captains for all shifts and furnish their names to the Board upon request.

The union timely petitioned for a rehearing. On August 31, 1995, its petition was denied. This petition for a writ of certiorari followed.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. THIS CASE RAISES AN IMPORTANT ISSUE OF FIRST IMPRESSION IN THIS COURT: WHETHER THE DISCOVERY PROVISIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE APPLY TO INJUNCTIVE AND/OR CONTEMPT PROCEEDINGS BROUGHT BY THE N.L.R.B. IN THE FEDERAL COURTS

This Court has held that the government as a litigant is, like any other litigant in the federal courts, subject to the rules of discovery. United States v. Procter & Gamble Co., 356 U.S. 677, 681 (1958). However, this Court has not specifically addressed whether the discovery provisions[2] of the Federal Rules of Civil Procedure apply to injunctive and/or contempt proceedings brought by the National Labor Relations Board in the federal courts.

F.R.Civ.P. 81(a)(5) expressly provides that "in respects not covered by" 29 U.S.C. §§ 159 and 160 (governing enforcement proceedings brought by the Board), "the practice in the district courts shall conform to these rules so far as applicable." The statute does not cover discovery procedure. Accordingly, several lower courts have held that the discovery provisions of the Federal Rules of Civil Procedure apply where the Board brings an action for injunctive relief pursuant to 29 U.S.C. § 160(j). Kobell v. Reid Plastics, Inc., 136 F.R.D. 575, 579 (W.D. Pa. 1991); Meter v. Minnesota Mining and Mfg. Co., 42 F.R.D. 663 (D. Minn. 1967); Fusco v. Richard W. Kaase Baking Co., 226 F. Supp. 459, 463 (N.D. Ohio 1962). It has also been held that the Rules apply to actions for injunctive relief brought pursuant to 29 U.S.C. § 160(l). Sperandeo v. Milk Drivers & Dairy Employees Local 537, 334 F.2d 381 (10th Cir. 1964); Madden v. Milk Wagon Drivers Union Local 753, 229 F. Supp. 490, 492 (N.D. Ill. 1964). Such judicial proceedings have been distinguished from hearings conducted before the Board itself and not involving resort to the courts by the government.

The Board nonetheless succeeded in claiming that it is not

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[2] This Court has recognized that the pleading requirements and the rules governing joinder of claims apply to damage actions brought pursuant to the National Labor Relations Act. United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966).

bound by the Federal Rules of Civil Procedure. As a result, the union was deprived of the benefits of both civil and criminal law; it was denied access to the pretrial discovery allowed by civil law, and it was denied access to a jury trial and other rights accorded a criminal defendant. A writ of certiorari should issue in order to clarify whether the Federal Rules of Civil Procedure apply to injunctive and/or contempt proceedings brought by the Board.

II. IT IS NECESSARY FOR THIS COURT TO REVISIT AND CLARIFY THE "KNOWING TOLERANCE" STANDARD FIRST ENUNCIATED BY THIS COURT IN GIBBS

In order to hold the union itself responsible for the illegal activities of its members, there must be "clear proof that the organization ... charged with responsibility for the offense actually participated, gave prior authorization or ratified such acts after actual knowledge of their perpetration." United Bhd. of Carpenters v. United States, 330 U.S. 395, 403 (1947). Accord Carbon Fuel Co. v. United Mine Workers, 444 U.S. 212, 218 (1979). It is not enough to show that random misconduct occurred which the union only learned of afterward. Rather, there must be proof that the union "participated actively or by knowing tolerance" in the misconduct. United Mine Workers of America v. Gibbs, 383 U.S. 715, 739 (1966).

That standard was not met. As the Special Master repeatedly acknowledged in his report, there was no evidence that the union had authorized any of the wrongful acts. That is because the evidence was to the contrary; i.e., the union had attempted to control the conduct of its members by issuing specific instructions to its picketing members, removing noncompliant members and other measures.

The Special Master recommended that the union be held in contempt solely because the measures it relied upon did not

succeed in completely regulating the conduct of its members. In essence, he applied a strict liability standard, equating any failure of the union's efforts with the "knowing tolerance" required by Gibbs. That was patently erroneous.

Not only that, but the original restraining order was itself without foundation. The restraining order had issued simply because the Court of Appeals looked back nearly two decades and located three other cases in which striking union members violated the National Labor Relations Act.

During those years, the union had engaged in numerous strikes and labor disputes. There was no evidence that the union had consistently authorized, participated in or ratified picket line misconduct. To the contrary, the most "recent" of the cases upon which the Court relied was eight years old and involved a mere seven employees and an employer who was itself found guilty of violating the Act (thereby provoking its employees into retaliating). The fact that the union's largely peaceful picketing record was marred by the occasional intemperate conduct of individual members did not demonstrate that the union itself had "knowingly tolerat[ed]" those outbursts.

This Court should grant certiorari in order to clarify the "knowing tolerance" standard. It is clear from the Special Master's stated reliance upon the decisions of the Board itself that the Board has misinterpreted Gibbs. Because it is patently unjust to hold a union strictly accountable for any failure in its efforts to maintain order, it is time to revisit Gibbs for the guidance of all concerned.

III. IT IS IMPORTANT FOR THIS COURT TO CLARIFY WHETHER BAGWELL APPLIES TO THE SECOND STAGE OF CONTEMPT PROCEEDINGS, WHERE THE DEFENDANT IS THREATENED WITH THE FIXING OF A MANDATORY FINE SCHEDULE

This case raises an important opportunity to clarify whether Bagwell means that a defendant charged with out-of-court disobedience to a complex injunction is entitled to a jury trial when threatened with the fixing of a serious mandatory fine schedule, or whether the right to a jury trial must await the third stage of contempt proceedings (imposition of the predetermined fines).

Due process dictates that the defendant's right to a jury trial should not depend upon the stage of the contempt proceeding. Regardless whether the court has been asked to adjudicate violations of a complex injunction and determine a mandatory fine schedule, or to impose the predetermined fines, the defendant is entitled to impartial fact-finding. In both instances, difficult proof problems must be resolved. In both instances, the "core justification" for avoiding a jury trial — to wit, that the court must have the ability to conduct the proceedings immediately before it — is not implicated. Therefore, due process demands greater procedural safeguards than were provided where, as here, the same court was asked to issue a restraining order, adjudicate its violation and determine the appropriate penalties.

Indeed, criminal contempt sanctions may not lawfully be "imposed on some who has not been afforded the protections that the Constitution requires of such proceedings." Hicks v. Feiock, 485 U.S. 624, 632 (1988). Indirect contempts such as those at issue here, involving out-of-court disobedience to complex injunctions and the fixing of mandatory prospective fines, are presumptively criminal in nature. Bagwell. Regardless of their classification, however, such contempts implicate the defendant's right to a trial by jury because of the elaborate and neutral fact-finding they require.

The union and its members were denied that right. Following a trial by ambush (owing to the Board's noncompliance with the Federal Rules of Civil Procedure), they were

subjected to a nonjury hearing before a Master who refused to consider their good-faith efforts to achieve compliance with the June 1986 order and other substantive defenses. Certiorari should be granted to clarify that the serious constitutional concerns addressed in Bagwell exist at the second stage of contempt proceedings and may not be ignored.

IV. THIS CASE PRESENTS IMPORTANT ISSUES REGARDING THE VALIDITY OF MANDATORY PROSPECTIVE FINE SCHEDULES AND INTRUSIVE GOVERNMENTAL ACCESS TO UNION INFORMATION AND ACTIVITIES

"[I]n contempt proceedings, courts should never exercise more than 'the least possible power adequate to the end proposed.'" United States v. United Mine Workers of America, 330 U.S. 258, 332 (1947). Prospective fines are an extreme remedy which should rarely be employed. N.L.R.B. v. Trailways, Inc., 729 F.2d 1013, 1023 (5th Cir. 1984); Florida Steel Corp. v. N.L.R.B., 648 F.2d 233, 240 (5th Cir. 1981).

The "end proposed" in this instance was to prevent future picket line misconduct similar to that found to have taken place: blocking ingress and egress, gluing locks and making threats. The "remedy" imposed by the Court of Appeals was punitive and out of all proportion to the nonviolent conduct it sought to curb.

A glued lock may be readily and inexpensively remedied. Imposing a mandatory $10,000 fine per glued lock is neither reasonable nor necessary. Far more limited coercive sanctions would have been sufficient to accomplish the desired result. By the same token, a mandatory $10,000 fine, to be levied upon the making of any threat, regardless of its heat-of-the-moment character or the apparent inability or unwillingness of the maker to carry it out, is not justified. The same is true of sanctioning the union $10,000 if the appointment of a picket captain is overlooked on a single shift.

Not only was the mandatory fine schedule unduly harsh, but the court denied the union any opportunity for a purge. However minor the infraction, the $10,000 fine is to be imposed. Under the circumstances, it is clear that the Court of Appeals exercised a great deal more than the "least possible power adequate to the end proposed." For this reason, its fine schedule was excessive by constitutional standards and violated due process. Id. at 304.

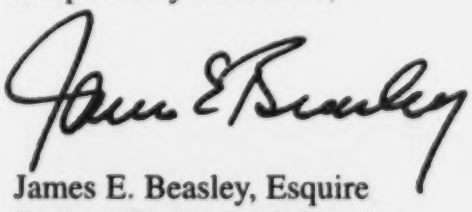
The intrusive discovery into the union's membership and picketing activities authorized by the Court's order also was unwarranted and unconstitutional. The Board does not need the union's membership lists to determine whether its picket lines are peaceable. It does not need to know the identities of the picket line captains, in the absence of actual violations. The order can only be viewed as an effort by the Board to chill the associational and grievance rights of the union.

It is crucial that unions remain free to express the legitimate grievances of their members. Certiorari should be granted to determine whether inflexible mandatory fine schedules and intrusive discovery orders constitute "the least possible power adequate to the end proposed."

CONCLUSION

Wherefore, it is respectfully requested that a writ of certiorari issue.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3195

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
TEAMSTERS LOCAL 115,
Respondent
and
HAROLD FISHER, GERARD McNAMARA,
and JOSHUA JOHNSON,
Additional Respondents in Contempt.

Before: MANSMANN, ROTH and SEITZ, Circuit Judges.

CONTEMPT ADJUDICATION

IT IS ORDERED AND ADJUDGED that Teamsters Local 115 ("Local 115" or "the Union"), Harold Fisher, and Joshua Johnson are in civil contempt for having violated this Court's judgment entered June 19, 1986 ("the judgment").

IT IS FURTHER ORDERED that Local 115, its officers, agents, and representatives, including but not limited to Harold Fisher and Joshua Johnson, shall purge themselves of contempt by taking the following actions:

1. (a) Fully complying with and obeying the judgment and the provisions of the Board's order enforced thereby, and in no way, by action or inaction, conducting, engaging in, inducing, encouraging, permitting, or condoning any violation of said judgment;

(b) Refraining from blocking ingress to or egress from

the premises of Service America Corporation, New Kensington Community Development Center, Drexel University, National Car Rental, Beaver, College, or any other employer; threatening employees and other persons with violence or other reprisals; assaulting or striking employees or other individuals or throwing or brandishing objects at them; shoving, chasing, or spitting at employees or other individuals; or causing damage to vehicles or other property;

(c) Refraining from in any other manner restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act;

2. That Local 115 shall immediately deposit $15,000 in an interest-bearing account in the registry of the United States District Court for the Eastern District of Pennsylvania as a conditional fine to be remitted upon performance of the actions enumerated in subparagraphs (a) through (e) below.

(a) Local 115 shall make Richard and Mollie Repetto whole for property damage by paying them $1,519.03;

(b) Local 115 shall immediately duplicate at its own expense and post in conspicuous places where notices to employees and members are customarily posted for a period of sixty (60) consecutive days, copies of the contempt adjudication and of an appropriate notice in the form prescribed by the Board, signed by an appropriate officer on behalf of Local 115, and by Joshua Johnson and Harold Fisher, stating that they have been adjudged in civil contempt of this Court for violating and disobeying and failing and refusing to comply with this Court's judgment and will undertake forthwith the action ordered in purgation; Local 115 shall maintain such notices and copies of the contempt adjudication in clearly legible condition throughout the posting period and shall ensure that they are not altered, defaced, or covered by any other material; and shall supply to the Director for the Board's Fourth Region ("the Regional Director") a signed copy of the notice and a certification of the dates and location of posting;

(c) Local 115 shall provide sufficient signed copies of said notice to the Regional Director for posting at the offices of Service America Corporation, New Kensington Community Development Center, Drexel University, National Car Rental and Beaver College, if such employers so desire;

(d) Local 115 shall sign, duplicate, and mail, at its own expense, copies of said notices and of the adjudication to all members of Local 115, including all individuals who have been members since February 1992, and to each officer, agent, and representative of Local 115, and shall submit to the Regional Director a list of such members, officers, agents and representatives, and their addresses together with proof of mailing;

(e) An appropriate officer of Local 115 shall read said notice at the next regularly scheduled meeting of its membership following issuance of the contempt order. Local 115 shall give the Regional Director at least two weeks' notice of such meeting and shall permit a Board agent to attend the reading, at the option of the Regional Director;

3. In any future picketing by an representative or agent of Local 115, Local 115 shall take the following actions:

(a) At the outset of such picketing, Local 115 shall give each picket a copy of the judgment and this contempt adjudication, and require each such person and any other person assigned to supervise or maintain picket line activity on behalf of Local 115 to sign a receipt acknowledging that the documents have been received, read, and understood and that they will be complied with; and upon request Local 115 shall submit said documents to the Regional Director;

(b) Local 115 shall maintain sign-in sheets for all shifts at all authorized picket lines;

(c) For all shifts at all authorized picket lines, Local 115 shall designate at least one picket captain to be responsible for supervision of the picketing, who shall be present on the picket line at all times; Local 115 shall, upon request, fur-

nish the Regional Director with the names of all such picket captains, with the dates and times on which he or she was acting in that capacity, within ten days of the request.

4. Local 115, Joshua Johnson, and Harold Fisher shall file separate sworn statements with the Clerk of this Court and copies thereof with the Regional Director within fifteen (15) days after the entry of this adjudication, and again upon termination of the posting period, showing what steps they have taken to comply herewith, and making such further reports as the Court may require.

5. Respondents shall pay to the Board all costs and expenses, including reasonable attorneys' fees, incurred by the Board in the investigation, preparation, presentation and final disposition of this proceeding.

IT IS FURTHER ORDERED that the Board, in order to verify and ensure compliance with the judgment and this contempt adjudication, may obtain discovery from any person, including, but not limited to, Local 115, its officers, agents, representatives and employees, in the manner provided by the Federal Rules of Civil Procedure, upon any matter reasonably related to compliance with the judgment or this contempt adjudication; and that, should a dispute arise between the parties respecting such discovery, upon the motion of either party the Court shall appoint a special master, with such duties and powers as the Court shall specify, to supervise the discovery.

In order to assure against further violations of the judgment of this contempt adjudication, the Court hereby imposes, subject to the requirements of due process of law, a prospective non-compliance fine of $10,000 against Local 115 for each and every future violation of the judgment or this adjudication, and a further fine of $1,000 per day for each day the Court finds such violation to have continued; and imposes a prospective fine of $1,000 per violation and $500 per day against each officer, agent, attorney, representative or any other person who, with notice or knowledge of the judgment

or this contempt adjudication, acts in concert or participation with Local 115 to violate the judgment or this adjudication.

Upon the failure of Local 115 to purge itself of civil contempt, the Court reserves jurisdiction to issue a writ of body attachment against any officer, agent, or representative responsible for such non-compliance, and to take such other and further action and grant such other and further relief as may be deemed just, reasonable, and necessary to assure compliance with the Court's judgment and as this proceeding in civil contempt may require.

SO ORDERED:

Carol Los Mansmann
Circuit Judge

Dated: JUL 20 1995

Certified as a true copy and issued in lieu
of a formal mandate on October 2, 1995.

Teste:

P. Douglas Sisk
Clerk, U.S. Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3195

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

TEAMSTERS LOCAL 115,
ETC. AND
HAROLD FISHER, GERALD MCNAMARA
AND JOCKO JOHNSON
(NLRB No. 4-CB-6756, 4 CB-6753,
4-CB-6668 and 4-CB-6527)

Before: MANSMANN, ROTH and SEITZ, Circuit Judges.

ORDER

This cause came to be considered on petition of the National Labor Relations Board for an adjudication in civil contempt and for other civil relief, the respondents' answers thereto and this court's order dated November 22, 1993, by which we referred the matter to a Special Master.

The Special Master submitted his Report and Recommendation, the respondents filed objections thereto, and the National Labor Relations Board filed a response to the Special Master's report and a response to the respondents' objections. We hereby adopt the Report and Recommendation of the Special Master dated October 12, 1994, in which the Special Master recommends that the petition seeking to find

Teamsters Local 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America, along with Harold Fisher and Jocko Johnson, in contempt of this court's order of June 19, 1986, be granted.

It is thus ordered that the Teamsters Local 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America, Harold Fisher and Jocko Johnson, are hereby adjudged in contempt of this court's order of June 19, 1986.

It is further ordered that the National Labor Relations Board is directed to file a brief addressing the issue of the appropriate remedy and a proposed order within fourteen days of the date of this order. The respondents shall file a response to the National Labor Relations Board's submissions within fourteen days thereafter.

BY THE COURT,

Carol Los Mansmann
Circuit Judge

Attest:

P. Douglas Sisk, Clerk

Dated: January 13, 1995
AP/cc: (JFF
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(WW
NHB III

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner

VS.

TEAMSTERS LOCAL 115,
a/w INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA,
NO. 93-3195
Respondent
AND
HAROLD FISHER, GERALD McNAMARA and
JOCKO JOHNSON,
Additional Respondents in Contempt

REPORT AND RECOMMENDATION

TULLIO GENE LEOMPORRA
UNITED STATES MAGISTRATE JUDGE
October 12, 1994

Presented for consideration is the National Labor Relations Board's ("NLRB") ("Board") petition before The United States Court of Appeals for the Third Circuit. The NLRB requests that the Third Circuit find Teamsters Local 115, a/w

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, ("Union"), along with Harold Fisher, Gerald McNamara, and Jocko Johnson in civil contempt of this Court's order of June 19, 1986. The NLRB contends the respondents engaged in contumacious acts during their strikes against:

(1) Service America Corporation ("Service America");
(2) New Kensington Community Development Center ("New Kensington");
(3) Drexel University;
(4) National Car Rental ("National"); and
(5) Beaver College.[1]

PROCEDURAL HISTORY

On June 19, 1986, this Court in an unpublished memorandum opinion enforced the finding by the Board[2], that the

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[1] The original petition only complained of acts against Service America, New Kensington and Drexel University, it was later twice amended, without objection, to add National and Beaver College. Unless otherwise indicated, all references will be to NLRB's third and final petition.

[2] The Board's opinion and order is reported at 275 NLRB 1547. The order, in pertinent part, states that:

Teamsters Local 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, its officers, agents, and representatives shall:

1. Cease and desist from:

(a) Restraining or coercing employees of Gross Metal Products, Inc. or any other employer by (1) obstructing, blocking and preventing ingress and egress of vehicles, employees and other persons from the premises of Gross Metal Products or of any other employer; (2) threatening employees or other individuals with violence or other reprisals; (3) assaulting or striking employees or other indi-

Union violated Section 8(b) (1) (A) of the National Labor Relations Act, 29 U.S.C. 158(b) (1) (A)[3] ("the Act"). NLRB v. Teamsters Local 115, Docket No. 85-3628.

On May 4, 1993 the National Labor Relations Board ("NLRB") filed a petition with the Third Circuit requesting they find respondents in contempt of the Third Circuit's order of June 19, 1986. On June 21, 1993 the Teamsters motioned for a more definite statement and for extension of time for a response. On July 22, 1993, the Third Circuit denied the motion for a more definite statement and ordered that the Teamsters respond within 30 days.

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viduals or throwing or brandishing objects at them; (4) causing damage to vehicles or other property; (5) mass picketing, pushing, shoving chasing or spitting at employees or other individuals — because employees or other individuals have crossed or attempted to cross Respondent's picket lines.

(b) In any other manner restraining or coercing employees of Gross Metal Products, Inc. or any other employer in violation of Section 8(b)(1)(A) of the Act.

[3] § 158 (1) (b) (A) states, in pertinent part:

(b) Unfair labor practices by labor organization

It shall be unfair labor practice for a labor organization or its agents

— (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title...

§ 157 provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a) of this title.

On July 30, 1993, the respondents filed a petition for Permission to Appeal under 28 U.S.C. §1292; F.R.A.P. 5 and/or Motion for Reconsideration — which was denied on August 9, 1993.

On November 22, 1993, the undersigned was appointed as a Special Master, to conduct a hearing and to make recommended findings of fact and conclusions of law to the Court with respect to allegations in the NLRB's petition. A pretrial conference was scheduled for January 18, 1994, which was continued due to inclement weather. On January 24, 1994, a letter was sent to counsel instructing them that briefs should be filed in two weeks and that both sides should continue discovery.

On April 7, 1994, a hearing was scheduled for April 21, 1994 to discuss any discovery disputes and any settlement possibilities. Because it appeared that discovery was not proceeding voluntarily, counsel were also instructed to list and proceed with depositions of witnesses. On April 8, 1994, counsel were notified that the first hearing on the merits had been scheduled for May 3, 1994.

At the conference of April 21, 1994, I granted the NLRB's two motions to amend its contempt petition. The amended petition now included contumacious conduct by the Union which occurred during its strike against National and Beaver College. At the conference the respondents made a motion to compel witness statements. I denied the motion on April 28, 1994.[4]

Substantive hearings were held on May 5, 6, 11, 17-20, 26, 27, 1994. On May 17, 1994, respondents motioned the Third Circuit to instruct the Special Master to continue the hearings in order for the respondents to engage in prehearing discovery. They also motioned the Court to stay proceedings pending resolution of their motion to instruct. On May 18, 1994, the

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[4] See discussion of motion infra.

Third Circuit denied without prejudice to the merits of the motions, if and when raised at an appropriate time.

During the hearings four motions to quash subpoenas served by respondents on Beaver College, Special Response Corporation (SRC)[5], National, and Drexel University were presented to the Special Master. On June 1, 1994, a hearing was held on these motions. On June 27, 1994, the undersigned issued a Memorandum and Order quashing the subpoenas, finding them to be untimely and the information sought irrelevant.

During the hearings on the New Kensington strike John Carpenter, a management employee of New Kensington, produced a micro-cassette of an alleged incident between himself and a union picketer. The micro-cassette was inaudible, therefore the petitioner was ordered to send the tape to the Federal Bureau of Investigations to have it enhanced. On June 14, 1994, a hearing was held to listen to the enhanced tape and determine whether it should be admitted into evidence.

On July 13, 1994, the Union filed a motion for dismissal before the Third Circuit, on the grounds according to United Mine Workers v. Bagwell, 62 USLW 4705 (1994), that this should be a criminal contempt proceeding, not a civil contempt proceeding. On September 2, 1994, the Third Circuit denied the motion to dismiss.

The last post-trial briefs were filed on July 15, 1994. All of the testimony has been transcribed and the transcript, with the exhibits, accompanies the present report and recommendation.

STATEMENT OF THE ISSUES

1. Whether the Union violated ¶ (a) (1) of the Third

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[5] Special Response Corporation is a security company located in Towson, Maryland. They provided security services to Drexel University, National, and Beaver College during labor disputes with the respondents.

Circuit's Order by obstructing, blocking, and preventing ingress and egress of vehicles, employees and other persons at the premises of any employer because such employees or other individuals have crossed or attempted to cross the Union's picket lines.

2. Whether the Union violated ¶ (a) (2) of the Third Circuit's Order by threatening employees or other individuals with violence or other reprisals because such employees or other individuals have crossed or attempted to cross the Union's picket lines.

3. Whether the Union violated ¶ (a) (3) of the Third Circuit's Order by assaulting or striking employees or other individuals or throwing or brandishing objects at them because such employees or other individuals have crossed or attempted to cross the Union's picket lines.

4. Whether the Union violated ¶ (a) (4) of the Third Circuit's Order by causing damage to vehicles or other property because employees or other individuals have crossed or attempted to cross the Union's picket lines.

5. Whether the Union violated ¶ (a) (5) of the Third Circuit's Order by engaging in mass picketing, pushing, shoving, chasing, or spitting at employees or other individuals because such employees or other individuals have crossed or attempted to cross the Union's picket lines.

FINDINGS OF FACT

A. SERVICE AMERICA CORPORATION

1. Service America is a food service company that manages cafeterias and vending machines for numerous hospitals, colleges, and businesses in the Delaware Valley. Service America operates primarily out of their facilities in West Chester, Pennsylvania. (Klambara, Tr. 5/11/94 at 5).

2. Originally, the employees of Service America were represented by Teamsters Local 513. In 1991, Local 513

began to have financial difficulties and as a result was merged with Local 115. (DeTreux, Tr. 5/11/94 at 94).

3. Towards the end of 1991 the Union attempted to negotiate a contract for its members with Service America. On February 10, 1992 the Union went on strike, until late March of 1992. (DeTreux, Tr. 5/11/94 at 94-99).

4. At the time of the strike Service America employed fifteen drivers and five mechanics at its West Chester facility. All fifteen drivers and two mechanics went on strike. Five drivers returned before the strike had ended. (Klambara, Tr. 5/11/94 at 6-7, 22-24).

5. The Union posted pickets at the West Chester facility everyday of the strike. The number of pickets would range from two to twenty-five individuals.[6] Since Service America conducts most of its business away from its facility the Union also engaged in ambulatory picketing.[7] (Klambara, Tr. 5/11/94 at 7-9; Fisher, Tr. 5/11/94 at 112-114).

6. Harold Fisher, a ten year Union trustee and thirty-three year member of the Union, supervised all of the picketing. Fisher never attended the Union's training school on picket line conduct, but had been involved in approximately thirty to forty picket lines. (Fisher, Tr. 5/11/94 at 112-114, 126).

7. Michael Klambara, Account Supervisor for Service America, would normally be the last person to leave the facility at the end of each day. As he would attempt to leave the

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[6] The picket line consisted of striking employees along with substitute pickets. Substitute pickets or volunteer pickets are individuals who are not striking employees and may or may not be a member of the union, and who are used to strengthen and support actual striking employees. (Smith, Tr. 5/5/94 at 164-166).

[7] Ambulatory picketing - the following of a replacement worker or nonstriking employee to a customer's location and establishing temporary picket lines while replacement worker or non-striking employee performs his/her duties. (Smith, Tr. 5/5/94 at 167-168; Fisher, Tr. 5/11/94 at 113-114; Respondent's exhibit 3 at p. 40).

pickets would walk in a tight circle around his car. While his car was stopped they would begin to call him names, make derogatory remarks about his family members, and spit on his windows. (Klambara, Tr. 5/11/94 at 9-10).

8. On one particular day in February, while Klambara was returning from a delivery at Aviation Supply Office in Northeast Philadelphia, he was followed by ambulatory pickets. The pickets followed him down the Roosevelt Boulevard onto the Schuylkill Expressway and then onto U.S. Route 202. Route 202 is a two lane highway in each direction. At King of Prussia, on Route 202, Klambara was in the right lane when the pickets surrounded his truck, one picket in front of him, one in back of him and one to the left of him. The pickets then slowed down to approximately twenty miles per hour. This lasted for approximately fifteen miles, until they reached the exit on Route 202 for Service America. (Klambara, Tr. 5/11/94 at 17-19).

9. As Klambara approached the entrance of Service America the car that was to the left of Klambara speed ahead of him. At the entrance gate of Service America the car turned around and proceeded to drive directly at Klambara's truck at a rate of thirty-five miles per hour. At the last moment the car swerved back into his lane to avoid collision. (Klambara, Tr. 5/11/94 at 19).

10. Sometime in late February, at approximately 5:00 a.m. another Service America driver, Wilbur Fromme, was followed by ambulatory pickets. While Fromme was driving on Route 202 they surrounded his car and slowed down to approximately fifteen miles per hour. This lasted for a few miles. (Fromme, Tr. 5/11/94 at 73-75).

11. On another day in February, when Fromme was servicing Soblar Corporation, a security officer at Soblar informed Fromme that there was a man with a baseball bat at one of the exits of the parking lot. At the only other exit the Union had established a temporary picket line. As Fromme

drove towards the exit with the ambulatory pickets, the individual with the bat got into a car a began to follow Fromme. When Fromme left the parking lot, three additional cars containing pickets began to follow him onto Roosevelt Boulevard. Roosevelt Boulevard is a heavily traveled six lane highway. The cars then proceeded to surround Fromme's truck, one car in front of him, one car in back of him, and one car to each side of him, and slowed down. This continued for a few miles. (Fromme, Tr. 5/11/94 at 76-78, 82-83, 88-90).

12. Service America experienced excessive amounts of vandalism during the strike. One day during the strike Fromme returned from servicing machines at a nursing home and disovered that someone had glued the lock shut to the back door of his truck. Except for traffic lights, the only time Fromme stopped was when he was leaving the nursing home a group of pickets walked around his truck as he was waiting for traffic to clear so he could make a turn onto the highway. (Fromme, Tr. 5/11/94 at 69-71).

13. One day during the first few weeks of the strike Klambara was being followed by two individuals in a car, while he was on his way to make a delivery to General Electric. Upon seeing a police car parked on the opposite side of the road, Klambara made a u-turn and pulled behind the police car. The car following also made a u-turn and pulled behind Klambara's car. Klambara informed the police officer that he was being followed and that he was concerned since he had money and merchandise on the truck. At this point Fisher and another individual approached the officer. They identified themselves and explained that they were engaged in lawful ambulatory picketing. Klambara, deciding not to proceed to General Electric, returned to Service America without making any stops. When Klambara went to unload his truck, he was unable to get the back door of his truck open, since someone had put glue in the lock. (Klambara, Tr. 5/11/94 at 9-12; Fisher, Tr. 5/11/94 at 116-119).

14. While servicing machines at Northeast hospital, Klambara was approached by Fisher. Fisher commented that Klambara was a hard man to find. The next day when Klambara returned to the hospital he was unable to open any of the vending machines, because someone had put glue in the locks. (Klambara, Tr. 5/11/94 at 12-14).

15. Fisher testified that he did not put glue in any of the truck locks or the vending machine locks, nor did he observe any pickets committing these acts of vandalism. (Fisher, Tr. 5/11/94 at 119).

16. Fisher testified that the only time that he would use vulgar language was when he was provoked by racist statements. Fisher further testified that he was not the type of person who goes around using vulgar language. (Fisher, Tr. 5/11/94 at 116, 129).

17. On cross examination, the petitioner showed a videotape of Fisher using vulgar and obscene language.[8] (Fisher, Tr. 5/11/94 at 131; Petitioner's Exhibit 7). Fisher claims that he was just responding to racist statements made by the video camera operator. (Fisher, Tr. 5/11/94 at 131-132). However, Fisher's demeanor was calm and collected. Nothing he said seems to indicate that he was responding to racist statements, rather it seems his intent was to insult and embarrass the videotape operator.

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[8] The videotape starts with Fisher approaching the cameraman. He then says the following:

Hey, do you got sound on that thing? Want to suck some black dick? Huh? Want to suck some black dick? Want to have your wife suck some black dick? Use that Camera...fucking cameras. We don't lose strikes. We may lose a few people, but no strikes. okay? Want to see my dick? Want to see my big, black dick? Huh? Huh? You don't want to see that. You don't want to shame yourself...strikebreakers. They don't make shit. Do you want to join the fucking union? Huh? Huh? Do you want to join the union? You supervisor would shit in his fucking pants. (Fisher, Tr. 5/11/94 at 131).

18. Klambara testified that before and after the strike no Service America truck or vending machine had glue injected into its lock. (Klambara, Tr. 5/11/94 at 16-17, 36). Fromme also testified that in his thirty-two years with Service America he had never had his truck lock glued. (Fromme, Tr. 5/11/94 at 73).

19. Edward Timicho, Jr., one of the striking maintenance mechanics, testified that finding glue in the locks of vending machines was a common form of vandalism. Timicho encountered this type of vandalism both before and after the strike. (Timicho, Tr. 5/11/94 at 144-145).

20. Klambara's and Fromme's testimony was credible. Timicho's testimony was not credible.[9] Timicho's testimony was also not consistent with another Union Witness, Richard Carrigan. Carrigan, a striking Service America mechanic, testified about the most common forms of vandalism to the vending machines he has encountered, he did not mention finding glue in locks. (Carrigan, Tr. 5/11/94 at 134-138). Neither Timicho nor Carrigan testified that they had ever encountered glue in the trucks' locks.

21. On March 3, 1992, the Union was engaged in ambulatory picketing at the Budd Company. When the Service America truck attempted to leave it was blocked by Fisher and another picket. Fisher and the other picket walked back and forth in front of the truck so that one of them was in front of the truck at all times. This went on for approximately twenty minutes. (Male, Tr. 5/11/94 at 46; Petitioner's exhibit 7).

22. After twenty minutes of blocking the Service America truck Fisher feigned being hit by the truck. Fisher then sat on the ground and began yelling that he had been hit and was not

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[9] On cross examination, Timicho was evasive when asked how common it was to find glue in the locks. Timicho first stated that it happens "on occasion" and later stated it happens "frequently". (Timicho, Tr. 5/11/94 at 144-145).

going to move until an ambulance arrives. Approximately twenty minutes later a police car arrived and transported Fisher to the hospital. (Male, Tr. 5/11/94 at 45-46; Fisher, Tr. 5/11/94 at 123-125; Petitioner's exhibits 7, 8). Fisher admits the truck did not hit him and that he was not hurt. (Fisher, Tr. 5/11/94 at 128-129).

B. NEW KENSINGTON COMMUNITY DEVELOPMENT CENTER

23. New Kensington is a non-profit housing and human services corporation that provides support services to low and moderate income families in the Kensington section of Philadelphia. In addition to providing support service, New Kensington purchases vacant homes in the neighborhood, renovates the homes and sells them to first time home buyers. New Kensington's Executive Director is John Carpenter who has held this position since December 1991. New Kensington operates out of two store front offices on Frankford Avenue. (Carpenter, Tr. 5/5/94 at 21-23, 57, 74).

24. New Kensington employs thirteen individuals, eight of whom were represented by the Union during all relevant times. In December of 1991, New Kensington and the Union began negotiations for the employees first collective bargaining agreement. On May 7, 1992, negotiations broke down and seven of the eight Union employees went on strike until mid September of 1992. The same day the employees went on strike the Union posted pickets at the Frankford Avenue Office. (Carpenter, Tr. 5/5/94 at 23-24, 74).

25. In addition to the striking employees, the Union deployed volunteers to help on the picket line. Three volunteers in particular served on the picket line everyday: Joseph Gravinese, Robert Davis, and Norma Bottomer. The testimony on the number of individuals on the picket line varied from each witness, but based on the testimony and exhibits presented I find the number of individuals on the picket line would

range from five to thirty people. (Carpenter, Tr. 5/5/94 at 24; Valentine, Tr. 5/5/94 at 137; LaFontaine, Tr. 5/5/94 at 152; McNamara, Tr. 5/5/94 at 191; Harris, Tr. 5/5/94 at 198; Hannah, Tr. 5/6/94 at 12; Gravinese, Tr. 5/6/94 at 81; Davis, Tr. 5/6/94 at 107; and Bottomer, Tr. 5/6/94 at 63).

26. In the first two months of the strike Union business agent Gerald McNamara was in charge of the picket line, however in the last three months of the strike Union trustee Earnest Harris was in charge of the picket line. Their duties included, interalia, handing out instructions on how to conduct a proper and lawful picket line. When neither of these two men were present at the picket line striking employee Marguerite Hannah, who later became shop steward, was in charge of the picket line. (Carpenter, Tr. 5/5/94 at 26; McNamara, Tr. 5/5/94 at 190; Harris, Tr. 5/5/94 at 197).

27. Both McNamara and Harris testified that during their respective times supervising the picket line they were on the line everyday, for at least eight hours a day. The court does not find much of their testimony to be credible, especially this point. Not only is this claim contradicted by petitioner's witnesses, but the Union's own witnesses testified that they were not there everyday, and the days when they were there, they did not remain the entire day. (Yobeck, Tr. 5/6/94 at 56; Bottomer, Tr. 5/6/94 at 72-73).

28. When clients of New Kensington approached the Frankford Avenue office the striking employees would: approach the client, explain their reasons for the strike, ask the client to honor the picket line, and provide the client with addresses of alternative agencies that would be able to help the client. (Hannah, Tr. 5/6/94 at 14; McNamara, Tr. 5/5/94 at 192; Harris, Tr. 5/5/94 at 199; Respondent's Exhibit 7).

29. Some clients chose to honor the picket line, but some did not. If a client chose to cross the picket line they would be subjected to severe intimidation tactics, even though they had small children with them. The pickets would begin screaming

"scab," "strikebreaker," "welfare cheat," and various obscenities, often amplifying their insults by using a bullhorn in close proximity to the client's face. Often the pickets would physically stand in front of the office doors blocking access of the office to the client. When access to the office was blocked one of the New Kensington staff members would go out and usher the client into the office. The clients that did succeed in getting into the office were visibly shaken, shocked and upset. (Carpenter, Tr. 5/5/94 at 31-35; Valentine, Tr. 5/5/94 at 129; LaFontaine, Tr. 5/5/94 at 152-154).

30. Each morning that Charles Valentine, New Kensington director of housing/counselling services, arrived for work he would be met by Gravinese and Davis. Gravinese testified that he is approximately six feet tall, and weighs about two hundred thirty (230) pounds. Davis is six feet five inches tall and weighs approximately three hundred seventy (370) pounds. They would walk Valentine to the front door, shoulder to shoulder, trying to trip him as he walked. After Valentine went inside they would hold the front door open. Valentine would then try to pull the door close, which would lead to a "tug of war game." (Valentine, Tr. 5/5/94 at 135-136). Both Gravinese and Davis deny these incidents. (Gravinese, Tr. 5/6/94 at 88; Davis, Tr. 5/6/94 at 127). However, the Court finds Valentine to be a more credible witness than either Gravinese or Davis.

31. David LaFontaine, New Kensington's director of community development, is openly gay. LaFontaine would not only have to endure the verbal attack the other New Kensington staff received daily, but he would also be subjected to anti-gay abuse.[10] Volunteer picket Norma Bottomer

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[10] The Union witnesses deny that they tried to intimidate anyone crossing the picket line. In fact, they would have this Court believe that they are the most devout pacifist of our time. Every Union witness testified that not only did they not use obscenities, but when taunted by New Kensington staff using obscenities their only response would be to yell

would sing vulgar songs about gay sex through the bullhorn each time she saw LaFontaine approach. (LaFontaine, Tr. 5/5/94 at 150, 157-158). Bottomer testified that she did not sing any vulgar songs about gay sex. This testimony is not credible, especially in light of her testimony on cross-examination where she admitted composing and singing creative songs with the intent to personally embarrass the person crossing the picket line. (Bottomer, Tr. 5/6/94 at 73).

32. On June 1, 1992, after a client complained of a white sticky substance on the front doorknob, Carpenter found that someone had put superglue on the doorknob. Later that same evening when Carpenter returned to the office he found someone had put glue in the locks to the front doors. Carpenter had to regularly replace locks that had been glued throughout the strike. New Kensington never had any problem before the strike began of anyone putting glue in the locks, nor have they had any problems since the strike ended. (Carpenter, Tr. 5/5/94 at 57-58, 64). All of the pickets who testified claimed that they did not put glue in the locks, however, I do not find this to be the case. New Kensington never had any problems with anyone putting glue in their locks prior to the strike nor after the strike.

33. At the rear of the New Kensington building is a gate that leads to the rear alleyway. The Union would picket this gate when they felt it was being used. During the course of the strike someone had screwed this gate closed. Carpenter testified that he saw Davis at this gate before it was screwed closed. Davis testified that he did not screw the gate closed nor had he seen anyone screw it closed, but he did notice that the gate had been nailed shut. (Davis, Tr. 5/6/94, at 114). Davis' testimony that he was not involved in screwing this gate closed is not credible.

"scab," "unionbuster," or like type statements. I do not give any credence to this testimony.

34. While the picketers were standing in front of the office they would sometimes pound on the plate glass window of the New Kensington store front. This eventually caused the glass to crack lengthwise from top to bottom. (Carpenter, Tr. 5/5/94 at 57). Once again the Union witnesses testified that no one would bang on the glass, the Union witnesses do concede that the glass was cracked, and they claim that it was cracked before the strike began. The testimony of the New Kensington witnesses was more credible than the Union's witnesses' testimony.

35. Bercon Builders, Inc. had been contracted by New Kensington to do housing renovations on the 2400 block of Amber Street.[11] The work was to commence on or about July 9, 1992. Bercon assigned four African-American males to the job site. When the Union discovered this site they posted pickets. The pickets would range anywhere from four to thirteen individuals. (Phillips, Tr. 5/5/94 at 94-96).

36. During the second day of renovations on Amber Street, four picketers blocked access of a Bercon truck attempting to back into the house's driveway. As Darryl Phillips, a Bercon foreman, attempted to back the truck in the picketers stood behind the truck taunting him to hit them. (Phillips, Tr. 5/5/94 at 95-97; Cory, Tr. 5/5/94 at 112, 120).

37. While the Bercon employees were trying to work on the second morning of renovations the picketers, who were all caucasian except for business agent Ernest Harris, and especially Gravinese would call the Bercon employees names, such as: "scab," "nigger," "asshole," "cocksucker," and other like names. The picketers also threatened to slash the tires of the Bercon trucks. (Phillips, Tr. 5/5/94 at 97; Cory, Tr. 5/594 at 112). Once again the Union witnesses testified that the only thing said to the Bercon employees was "scab" and "strike-

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[11] Amber Street is approximately two blocks from the New Kensington office. See plaintiff's exhibit 6.

breaker". Harris testified that being an African-American he would not stand for any derogatory racial comments and in his opinion Joseph Gravinese in particular is not the type of person to use ~~racial~~ or vulgar terms. (Harris, Tr. 5/5/94 at 200-205). The Court finds that normally Harris would not stand for racist comments, but when it come to picketing he was not so sensitive. Harris' assessment of Gravinese is completely erroneous, he is exactly the type of person who would use racist and vulgar statements, in fact, Gravinese has been captured on video and audiotape using very vulgar language. (Petitioner's Exhibits 34, 52, 53).

38. Bercon employee Henry Cory testified that while working in the back of the building Gravinese threw stones at him and threatened his life.[12] (Cory, Tr. 5/5/94 at 112-113).

39. At approximately 11:00 a.m. on the same day Carpenter and LaFontaine visited the Amber Street site. While walking to and back from Amber Street Gravinese and another picket followed them. Gravinese and the other picket would kick and insult Carpenter and LaFontaine. Gravinese insinuated that if Carpenter were a woman Gravinese would rape him. Gravinese threatened LaFontaine that he would, "Bend you over my knee and fuck you up the ass." (Carpenter, Tr. 5/5/94 at 46-47; LaFontaine, Tr. 5/5/94 at 155-156). Gravinese testified that he did follow them to the Amber Street site, but the only thing he did was to call them scabs. (Gravinese, Tr.

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[12] When Cory was asked what happened when he went out back, he responded:

A. Well, I was tearing a wall down and I heard like a rock hit the wall, so I looked around. This guy that everyone was calling Joey, he said, "Yeah, I did it," and he threw another one at me. Then he said, "Yeah, I should come in and kick your ass." Then he said, "What we should do is come in and do like we did in the old days, hang you up on the rafters."

Q. How did you interpret that?

A. I considered it a threat on my life.

5/6/94 at 92-94). Carpenter's and LaFontaine's testimony was very credible, however Gravinese's testimony on this incident, like his testimony in the other incidents is completely unbelievable.

40. On July 14, 1992, Carpenter left his office on foot in mid-afternoon to attend a meeting. As he crossed the street, Gravinese pulled up next to him in a small light-colored pick-up truck and began driving slowly alongside him as he walked down the street, calling him "fucking jerkoff" and "fucking prick" repeatedly. At the next corner, Gravinese cut in front of Carpenter and said, "Come on, step in front of my truck so I can run you the fuck over. I want to run you the fuck over." Carpenter turned around and tried to walk back the way he had come, toward the New Kensington office, thinking this would remove him from harm's way because it was a one-way street that Gravinese could not enter. But Gravinese backed up, going the wrong way up the street, and again cut him off. Twice, Gravinese pulled his truck onto the sidewalk blocking Carpenter's path. Carpenter had to squeeze between the truck and a building to get away. At this point, Carpenter recognized Marek Ratajczak, a contractor who had performed work for new Kensington, driving past. Ratajczak saw Carpenter walking on the sidewalk with a man who fits the description of Gravinese in a small gray pickup truck driving directly alongside him and exchanging harsh words. Ratajczak testified that the truck was stopping and starting abruptly, while its driver spoke to Carpenter, who appeared to be trying to cross the street but could not because of the truck repeatedly driving into his path. When Ratajczak, who is even larger than Gravinese, emerged from his van, Gravinese stopped stalking Carpenter. Carpenter then got into Ratajczak's van and was driven away. Gravinese followed them briefly. (Carpenter, Tr. 5/5/94 at 49-51; Ratajczak, Tr. 6/14/94 at 17-22; Petitioner's exhibits 52, 53).

41. On or about July 17, 1992, on his way home from the

office Carpenter was followed by Hannah, Bottomer, and Thelma Quinn, a striking New Kensington employee, in Hannah's car. When Carpenter stopped for a traffic light Hannah's car lightly tapped his bumper from behind. They continued following Carpenter and yelling at him in what he perceived to be a threatening manner. They discontinued their pursuit when they were forced to make a right turn at the next intersection and Carpenter went straight ahead. (Carpenter, Tr. 5/5/94 at 52-54). These women testified that they did follow him and they did lightly tap his car when he stopped short, but that is all they did. (Hannah, Tr. 5/6/94 at 28-29; Bottomer, Tr. 5/6/94 at 64-65; Quinn, Tr. 5/6/94 at 76). These women were clearly trying to intimidate Carpenter and their testimony to the contrary is unbelievable.[13]

C. DREXEL UNIVERSITY

42. Drexel University is located in Philadelphia, Pennsylvania.

43. The Union represents fifty maintenance employees, one hundred custodial employees and approximately fifty food service employees at Drexel. (DeTreux, Tr. 5/18/94 at 44).

44. On September 14, 1992, after negotiations over the maintenance employees contract broke down between the Union and Drexel, the maintenance employees went on strike. The custodial and food service employees honored the picket line. The strike lasted until December 29, 1992. (DeTreux, Tr. 5/18/94 at 44-45).

45. The Union picketed at a variety of locations, but the two primary areas were at 32nd and Chestnut Streets, and 34th and Market Streets. (Rowe, Tr. 5/17/94 at 42).

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13. The entire testimony of Ms. Bottomer was clearly ficticious. The more she testified the more embellished and outrageous her stories became.

46. Union Organizing representative Joshua "Jocko" Johnson was in charge of the picket line. (Johnson, Tr. 5/18/94 at 49-51). When Johnson was not present at the picket line, shop steward Dennis DeCataldo was in charge. (DeCataldo, Tr. 5/18/94 at 67). Both Johnson and DeCataldo distributed the Union's picket line instructions to the pickets. (DeCataldo, Tr. 5/18/94 at 66; Argeros, Tr. 5/18/94 at 84; Heim, Tr. 5/18/94 at 103; Reilly, Tr. 5/18/94 at 113; Mulvihill, Tr. 5/18/94 at 122).

47. Drexel normally contracts Pinkerton Security for its campus security needs. At the time of the strike, Richard Rowe was the Assistant Account Manager for Pinkerton assigned to Drexel. (Rowe, Tr. 5/17/94 at 86-87).

48. At the onset of the strike Drexel hired Special Response Corporation ("SRC"), to help with security. The SRC guards were present during the first two weeks of the strike and from 7:00 p.m. to 7:00 a.m. during the last three weeks of the strike. (Rowe, Tr. 5/17/94 at 42, 92).

49. SRC's role during the first two weeks of the strike was to gather evidence through videotaping and still photography and to act as a buffer between the Pinkerton guards and the pickets. During the last three weeks of the strike SRC was brought back in the evening hours to guard a construction site on campus. (Rowe, Tr. 5/17/94 at 42).

50. On September 15, 1992, at approximately 6:30 a.m., Rowe was notified of possible pickets in the quad area.[14] As Rowe and Lieutenant Christopher Edwards approached the quad they saw individuals who Rowe recognized to be janitorial employees of Drexel. Rowe informed these employees that since they were on sympathy strike that they were not permitted on Drexel property and asked them to leave. They com-

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[14] The quad area is an area of four buildings bonded by 33rd Street, 32nd Street, Market Street and Chestnut Street. (Rowe, Tr. 5/17/94 at 44).

plied. (Rowe, Tr. 5/17/94 at 44-45).

51. Rowe followed the employees out of the quad area, where he saw DeCataldo. Rowe informed DeCataldo that striking employees were not permitted on campus. At this point, Jocko Johnson approached Rowe screaming strike slogans and profanities through a bullhorn, within close proximity to Rowe. (Rowe, Tr. 5/17/94 at 46).

52. As Rowe returned to the quad he was followed by Johnson. When Rowe informed Johnson that he was trespassing on Drexel property, Johnson shoved Rowe and proceeded to the quad area. (Rowe, Tr. 5/17/94 at 47).

53. When Johnson arrived at the quad he was joined by DeCataldo and other pickets and they all started yelling strike slogans. Rowe advised DeCataldo that they were trespassing and asked them to leave. At this point Johnson came up behind Rowe and began yelling profanities through a bullhorn, inches from Rowe's left ear. (Rowe, Tr. 5/17/94 at 48).

54. Johnson testified that during the early stages of the strike the Union believed the quad area to be public property. (Johnson, Tr. 5/18/94 at 55).

55. Johnson and DeCataldo testified that Johnson did shove Rowe, but only after Rowe shoved Johnson. This testimony is not credible, especially since DeCataldo testified that Johnson was angry about being told that he was not allowed in the quad. (Johnson, Tr. 5/18/94 at ; DeCataldo, Tr. 5/18/94 at 77).

56. DeCataldo further testified that the closest Johnson had the bullhorn to Rowe's face was approximately four feet.[15] (DeCataldo, Tr. 5/18/94 at 68-69).

57. Perishable food deliveries to Drexel were normally scheduled twice a day. (Rowe, Tr. 5/17/94 at 56).

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[15] Assuming arguendo that Johnson only had the bullhorn four feet from Rowe's ear, this is still a disturbingly close distance.

58. On September 15, 1992, at approximately 7:30 a.m., four to five pickets were preventing a food delivery by walking in an elongated circle the width of the front bumper of the truck, so at no time did the pickets leave enough room for the truck to move forward. This continued for about fifteen to twenty minutes until the truck left. (Rowe, Tr. 5/17/94 at 49-50).

59. On the morning of September 16, 1992, Drexel arraigned to have the food delivery escorted through the picket line be a security van. However, six to eight pickets, led by Johnson, blocked both vehicles by walking in an elongated circle in front of the vehicles. (Rowe, Tr. 5/17/94 at 50-51, 56-57, 59; Petitioner's exhibit 12).

60. After approximately ten minutes of being blocked, Drexel Security attempted to have the vans cross the sidewalk and drive directly on Drexel property. The pickets followed the vehicles to the sidewalk and began walking in front of them, preventing them to enter the campus. This lasted for approximately fifty minutes. (Rowe, Tr. 5/17/94 at 57-65; Petitioner's exhibits 12 and 16).

61. Johnson testified that he tried to gain control over the situation and let the picketers know that they had to let the truck in the gate. However, the videotape of the incident clearly shows Johnson leading the pickets blocking the vehicle and yelling "on strike". (Johnson, Tr. 5/18/94 at 60-64; petitioner's exhibit 12).

62. The Union represents United Parcel Service (UPS) Drivers. During the strike, the UPS drivers would not cross the picket line. Drexel arranged to have its UPS deliveries made to a location off campus. The deliveries were then brought to Drexel by North American Rental trucks. (Rowe, Tr. 5/17/94 at 129-131).

63. On September 17, 1992, at 9:54 am., while a North American Rental truck was attempting to back into the loading dock area a picket stood directly behind the truck prevent-

ing the delivery. When the driver asked the picket to move, the picket responded, "I can't let you through. You'll have to run me over." The driver then slowly backed the truck within two feet of the picket, but the picket did not retreat. This incident lasted for approximately ten minutes, until the truck departed. (Rowe, Tr. 5/17/94 at 72-74; Petitioner's exhibit 14).

64. On September 17, 1992, the Honorable Gene D. Cohen of the Philadelphia Court of Common Pleas issued a Temporary Restraining Order against the Teamsters.[16] Before the Temporary Restraining Order was issued only one perishable food delivery was successful. (Rowe, Tr. 5/17/94 at 66; Petitioner's exhibit l0).

65. Sergeant Shawn Michael Gray, a Drexel Security officer, testified that on September 4, 1992, at approximately 4:00 pm., while he and three other security officers, Lieutenant Algernon Adams, Sergeant Miguel Ortiz and Brian Greene, walked past the Union strike headquarters at 32nd and Chestnut Streets, Ortiz became surrounded by four or five pickets and an argument ensued. Gray further testified that one of the pickets shoved Ortiz, which almost escalated into a brawl, but for the intervention of the Philadelphia Sheriff's Department. I find Gray's testimony to be credible, especially since there is no contrary testimony. (Gray, Tr. 5/18/94 at 13-15).

66. On October 1, 1992, Drexel arranged for Chem Lawn to cut the grass at the athletic facilities. Before the Chem Lawn people arrived there were Union pickets at the gate to the athletic fields. Johnson and Argeros were at the gate, but left before the Chem Lawn people arrived. (Gray, Tr. 5/18/94 at 8-9).

67. When the Chem Lawn people arrived they were denied

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[16] A final restraining order was entered on September 23, 1992 by Judge Cohen.

access by two pickets, Tony Gravinese and Hugh Vance. Vance was a striking maintenance employee. (Gray, Tr. 5/18/94 at 9; Vance, Tr. 5/19/94 at 33).

68. At some point while the Chem Lawn trucks were stopped, Vance feigned being hit by the lead truck and sat down in front of the truck. Vance sat there for approximately fifteen minutes until Deputies from the Sheriff's department arrived. The deputies asked Vance if he needed medical attention and he responded that he did not. The deputies then instructed Vance to get up and the trucks were then able to enter the facility. (Gray, Tr. 5/18/94 at 9-12; petitioner's exhibit 19A).

69. Vance testified that the Chem Lawn truck, while stopped, lunged forward and hit him in the back causing him to fall to the ground. He further testified that a police officer took him to a hospital, where he was x-rayed and treated for a bruised back. (Vance, Tr. 5/19/94 at 33-34).

70. Vance's testimony regarding being hit by the Chem Lawn truck is incredible. It is not only inconsistent with Gray's testimony, which I find credible, but it is also inconsistent with Johnson's and Argeros' testimony regarding the incident.[17]

71. During the period of the strike Drexel contracted with Santangelo Hauling for trash removal. (Coulson, Tr. 5/17/94 at 166).

72. Robert Coulson, a manager at Santangelo Hauling,

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[17] Vance testified that he and Gravinese were alone when the truck hit him, however Johnson testified that he was there. Argeros first indicated that he was there, but upon questioning of the Court he indicated that he and Johnson did not arrive until after Vance was on the ground. Johnson also testified that Vance was hit by a piece of machinery on the truck and he fell to the side of the truck. (Johnson, Tr. 5/18/94 at 63). However, Vance testified that he fell in the middle of the front of the truck. (Vance, Tr. 5/19/94 at 37) Argeros testified that the truck came "flying straight through" and knocked Vance down. (Argeros, Tr. 5/19/94 at 94).

would visit Drexel's campus three times a week during the strike. Coulson testified that when he visited Drexel he was subjected to name calling and foul language. He further testified that Argeros would frequently spit on him. (Coulson, Tr. 5/17/94 at 167).

73. On October 20, 1992, at approximately 8:30 am., while Coulson was in his truck he was approached by three Union pickets, Charles Argeros, Shawn Heim and Leo Reilly. This resulted in the pickets and Coulson trading obscenities. At some point during this exchange Argeros spat on Coulson, reached up with his cane and hit the mirror of the truck, shattering it. (Coulson, Tr. 5/17/94 at 171-173; Boles, Tr. 5/19/94 at 27-31).

74. When the mirror shattered a piece of it hit Coulson in the face and he became enraged. Coulson opened his door and was punched in the face by Argeros, as he was getting out of the truck. A fight then ensued between Coulson and Argeros, until Drexel security broke it up. (Coulson, Tr. 5/17/94 at 171-173; Boles, Tr. 5/19/94 at 27-31; petitioner's exhibit 19).

75. I find Coulson's testimony to be credible, but find no credence in the testimony of the Union's witnesses.[18]

76. On or about October 23, 1992, Debra Banks, a Drexel employee, and a Drexel professor were unable to exit the

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[18] Argeros, Heim and Reilly testified that they did not use obscenities nor did they spit on Coulson in any encounter with him. As to the incident on October 20, 1992, they all testified that Coulson was cursing at them, spat on Argeros and when he opened his door Argeros put his arms up to protect himself and Argeros' cane accidentally broke the mirror, which caused Coulson to get out of his truck and begin punching Argeros. (Argeros, Tr. 5/18/94 at 85-91; Heim, Tr. 5/18/94 at 99-109; Reilly, Tr. 5/18/94 at 113-119). This testimony is incredible.

Coulson's testimony, on the other hand, was very believable. When asked on cross examination of what his intention was when he got out of the truck, he answered, "To be honest with you I was going to hit him." (Coulson, Tr. 5/17/94 at 181).

parking lot behind the student center onto 32nd Street, because a Santangelo truck was stopped in the exit. After approximately seven to eight minutes Banks went to see why the truck was not moving. She saw four pickets walking in a tight circle in front of the Santangelo truck, preventing it from moving. Banks returned to her car and waited approximately eight minutes then, with sheriff's permission, she drove over the sidewalk and departed. The truck was still being blocked when she left. (Banks, Tr. 5/19/94 at 6-12).

77. On October 24, 1992, Drexel arranged to have a landscaping company to cut the grass on campus. Drexel security guards, led by Rowe, were assigned to escort the lawn crews. As the crew were assembling on the sidewalk Terence Mulvihill, DeCataldo and an unidentified picket began screaming at them with bullhorns. At this point Philadelphia Police Civil Affairs officers arrived, as did a van with two deputy sheriffs. As Rowe was escorting two tractors across the street Mulvihill and the unidentified picket were walking back and forth in front of a third tractor, preventing its crossing. Rowe stepped in between the tractor and Mulvihill in an effort to get the tractor across the street. Mulvihill became upset and extended his arm to Rowe's chest. One of the civil affairs officers came over and directed Mulvihill to step back, but he did not comply. The officer, then, put his hand to Mulvihill's chest and again directed him to step back, but Mulvihill just pushed the officer's hand away. When the officer put his hand to Mulvihill's chest and was again pushed away the officer told Mulvihill that he was under arrest. Mulvihill continued to strike at the officer, but was eventually apprehended and charged with disorderly conduct and resisting arrest.[19] (Rowe, Tr. 5/17/94 at 75-79).

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[19] Mulvihill and DeCataldo's testimonies are fairly consistent with Rowe's testimony. However, they claim the civil affairs officers was not in

78. Mulvihill was placed in Pennsylvania's Accelerated Rehabilitative Disposition program[20] and the Union asked him not to participate on the picket line anymore. (Mulvihill, Tr. 5/18/94 at 126).

D. NATIONAL CAR RENTAL

79. National operates car rental services in the Philadelphia area, including a downtown facility at 19th Street and one at the Philadelphia International Airport ("Airport"). National also operates an administrative and maintenance facility at 70th street. (Moody, Tr. 5/19/94 at 40-41).

80. On February 24, 1993, the Union commenced a strike against National. The strike ended on or about September 1, 1993. During the strike, the Union conducted picketing at all three of National's Philadelphia facilities. Initially, most of the employees honored the strike and picketed, however after the first three days of the strike, virtually all of the drivers and service agents returned to work. The mechanics continued to strike unanimously throughout the strike. After the drivers returned to work the Union began to use an increasing number of volunteer pickets at the airport. The number of pickets var-

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uniform nor wearing an identifying arm band that they normally wore. They also claim that the officer never identified himself as a police officer, until Mulvihill was apprehended, though DeCataldo did admit that he knew the man was a police officer. (Mulvihill, Tr. 5/18/94 at 123-126; DeCataldo, Tr. 5/18/94 at 70-76).

20 See Pennsylvania Rules of Criminal Procedure 160-162, 176-186.

> "These rules contemplate that ordinarily the defendants eligible for the ARD program are first offenders who lend themselves to treatment and rehabilitation rather than punishment and that the crime charged is relatively minor and does not involve a serious breach of the public trust. The program is intended to encourage offenders to make a fresh start after participation in a rehabilitative program and offers them the possibility of a clean record if they successfully complete the program." Committee Introduction to ARD rules.

ied from two up to fifty. Picket activity during the first two months of the strike was the most intense at the airport, as the strike progressed the pickets spent less time at the airport and devoted most of their time to the 70th Street site. (Moody, Tr. 5/19/94 at 42, 48, 52, 78-79, 83-84; McGee, Tr. 5/20/94 at 78; Johnson, Tr. 5/26/94 at 7, 40-41).

81. Johnson was responsible for the picket line and visited the site everyday during the strike. Johnson testified he handed out picket line instructions to all the pickets. Drivers who had picketed at the beginning of the strike testified that they were instructed by Johnson and by shop steward Lawrence Holley to walk slowly whenever buses or cars tried to come through the entrances. Johnson was present when this took place, as was Union Trustee Gerald McNamara.[21] (Johnson, Tr. 5/26/94 at 18-19, 26).

82. At the Airport, National drivers transport customers from the rental facility to the terminal and back, in a continuing circuit on a one-way, one-lane service road. There are three exits/entrances to the airport facility: a customer entrance, a rental return entrance, and a main exit gate for shuttle buses and rental customers. (Moody, Tr. 5/19/94 at 41, 45).

83. At the airport, the pickets would walk slowly across the driveways with a least one picket always in the path of National's buses, thereby blocking them for several minutes. This occurred virtually every time the buses attempted to enter or exit the lot.[22] (Miller, Tr. 5/19/94 at 112, 115-116, 131;

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[21] McNamara testified that he only visited the picket line once during the strike to deliver a message. (McNamara, Tr. 5/20/94 at 5). McNamara's testimony is not credible, especially in light of his highly contradicted testimony regarding his constant presence at the New Kensington picket line.

[22] The Union admits that its pickets were told to picket in front of buses and cars. Johnson testified that he instructed the pickets to walk back and forth in front of cars and buses to stop them while other pickets deliv-

Ginyard, Tr. 5/19/94 at 135-136; Culmer, Tr. 5/19/94 at 150-151).

84. While the buses were stopped, pickets would frequently activate the buses' emergency door-opening devices, causing the buses' side doors to open while they were transporting customers. The drivers would then have to drive away from the pickets, pull over on the one lane road, and close the door from the outside. (Moody, Tr. 5/19/94 at 52).

85. Also, while the buses were stopped the pickets would grab onto and dislocate the buses' exterior mirrors. Pickets would even dislodge the mirrors by hitting them with their heads.[23] (Moody, Tr. 5/19/94 at 49-50; Miller, Tr. 5/19/94 at 115-116, 118-119; Ginyard, Tr. 5/19/94 at 143-144; Culmer, Tr. 5/19/94 154-155; petitioner's exhibit 27).

86. Employees crossing the picket line would be subjected to personalized and obscene taunts. Pickets would often make graphic sexual statements to the drivers, even while transporting customers. (Ginyard, Tr. 5/19/94 at 135-136).

87. Joseph Lockhart, a striking employee, would call Barbara Culmer, a National bus driver who had oral surgery involving the removal of her teeth, "gummy bear" and asked

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ered the Union's message to the driver. Johnson also admitted, when shown videotape of picketing on different dates during the strike, that pickets were in fact engaging in headlight to headlight picketing of every bus that sought to exit the airport lot and every customer vehicle that sought to enter or exit the airport or the 70th Street facility. (Johnson, Tr. 5/26/94 at 21-38; Petitioner's exhibits 27 and 29).

[23] The Union's witnesses testified that it was impossible for anyone to hit the mirrors because they were too high to reach and that if anyone hit the mirror with their head it would cause serious head injury. (Rieber. Tr. 5/20/94 at 65-66). However, the Board showed a videotape of a picket hitting the mirrors with his head twice, knocking the mirrors flat against the side of the bus. (Petitioner's exhibit 27)

her whether she "could suck someone's penis".[24] (Culmer, Tr. 5/19/94 at 151).

88. Lockhart and fellow picket James Donahue would also subject John Whittaker, another bus driver who decided to return to work, with verbal abuse. As Whittaker would drive past the pickets, they would yell obscenities such a bitch, faggot, pussy and cocksucker; they would ask him if he was going to wear a dress to his supervisor's wedding, and asked whether he was performing fellatio on Miles Moddy or cunnilingus on his supervisor. Several times during the first three months of the strike one picket would block Whittaker's bus, while Donahue came over to his window and stated, "I'm going to blow your fucking brains out."[25] (Whittaker, Tr. 5/19/94 at 157-158, 161-162; Petitioner's exhibits 21 and 22).

89. The pickets would also yell at the passenger of the buses. A videotape showed Lockhart yelling, "I hope you all crash and die," and Larry Holley adding, "I hope you all get

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24 Lockhart, testified that he never used "offensive or racist" language on the picket line, though he did admit occasionally using obscenities. Lockhart's testimony is not credible. Lockhart was seen on videotape calling a bus driver "Aunt Jemima" and suggesting to Eleanor Rossiter, another driver, that she do something with a broom between her legs. The tape also shows Lockhart calling a driver "an AIDS-infested scab," asking a driver whether Maureen Enright, another driver, "suck[s] good dick,' and telling a driver "I was screwing your mommy last night...had her over like a dog...I had her howling like a dog," while his co-picket, Larry Holley, stood by howling. Lockhart admitted that he used his personal knowledge of the other employees to devise comments that would hurt them and make them "miserable". (Lockhart, Tr. 5/20/94 at 18-19, 23-25, 40-41, 47-52, 57-58; petitioner's exhibit 26).

25 Donahue testified that he never threatened Whittaker. Donahue did testify that he once told Whittaker that, "If brains were dynamite, you wouldn't have enough to blow your nose." Lockhart testified that he was usually with Donahue and never heard him threaten anyone. (Donahue, Tr. 5/20/94 at 11; Lockhart, Tr. 5/20/94 at 16-17). I do not find Donahue nor Lockhart credible witnesses.

humped by David Kennedy [the driver of the bus]." (Petitioner's exhibit 26).

90. On numerous occasions during the strike, the pickets, including Donahue, Joseph Fanelli, and Henry Kidd, intercepted the drivers while on route on the service road, they tailgated the National buses, cut them off, and slowed to a walking pace in front of them. (Ginyard, Tr. 5/19/94 at 140; Miller, Tr. 5/91/94 at 122).

91. One night, driver Ida Ginyard had left the National lot and was stopped at the service road intersection, observing traffic, when a car crossed in front of her. Inside the car, she could see the distinctive Union blue and gold jacket. As the car passed in front of her, someone in the car shone an intense bright light into her eyes, just as she was making the turn at the intersection. The bright light momentarily blinded her. (Ginyard, Tr. 5/19/94 at 139-140),

92. One day in early April, while bus driver Philip Miller was at the service road intersection looking to the right, watching traffic for an opening, he heard a loud thump of something striking the bus near his left window. Miller looked to his left and saw three pickets standing nearby watching him pass. Later, he saw the remains of mud and small stones, which were available in the area of the picketing because of resurfacing work being done on a nearby road, adhering to his bus where he heard the thump. (Miller, Tr. 5/19/94 at 120-121).

93. On numerous occasions in March, April, May, and June, pickets scattered nails in front of the 70th Street facility. The pickets would burn wooded pallets in a 55-gallon drum next to the drive way. When a significant number of nails had collected in the drum, the pickets would kick them across the driveway. SRC guards would then go out to clean up the nails. As the guards were cleaning up the nails the pickets would bump into them and try to step on their fingers. Eventually, the SRC guards began to videotape these incidents. The Civil

Affairs Unit of the Philadelphia Police Department told SRC to call whenever a nail sweep was necessary.[26] (Martin, Tr. 5/19/94 at 182-185; Petitioner's exhibit 23).

94. On or about March 26, 1993, at the 19th Street facility, National service agent Roscoe Cofield was subjected to racist verbiage by a picket, who called Cofield a "nigger motherfucker" from the moment he arrived and throughout his shift. When Cofield told the picket he would meet him after work, the picket responded by saying there was no need to wait until then and shoved Cofield. Cofield shoved the picket back and the two began to wrestle on the ground. Before the situation escalated, passersby pulled them apart and further fighting was averted. (Cofield, Tr. 5/19/94 at 96-99).

95. On April 2, 1993, at the 19th Street facility, picket Michael McGee and Johnson were blocking a customer's car from leaving. They stood in front of the car, McGee on the passenger's side, Johnson on the driver's side. When Curtney Smith, a security guard stationed at that facility, saw that the car was being blocked, he went out to it and held up his right arm to buffer the car from the pickets. In doing so, his outstretched arm apparently brushed McGee, who said, "Don't touch me," and threw a punch at Smith. Smith ducked and avoided the punch, then swung back at McGee, but he too missed. Johnson grabbed McGee and pulled him out of Smith's way, then began punching Smith. One of the customers from the blocked car got out and intervened and, with the assistance of an employee of the Kinney's parking lot, within which the National facility is located, stopped the

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26 Union witnesses testified that they never scattered any nails, but that SRC guards would take the nails that were right next to the barrel. (Reiber, Tr. 5/20/94 at 63; McGee, Tr. 5/20/94 at 86; Heidler, Tr. 5/20/94 at 92). These witnesses were not credible and their testimony is inconsistent with a video showing the SRC guards cleaning nails up that were scattered across the driveway. (Petitioner's exhibit 23).

fight.[27] (Smith, Tr. 5/18/94 at 238-243).

96. On April 14, 1993, pickets Joseph Fanelli and McGee stood flanking the car of Mary Murphy, a National bus driver, as she attempted to leave the 70th Street facility in her personal car. McGee and Fanelli were yelling insults at Murphy and pounding on the roof of her car, loudly enough to be heard by Miles Moody from his office, and hard enough to leave dents. Murphy immediately reentered the facility through the other entrance and filled out an incident report.[28] (Moody, Tr. 5/19/94 at 60-62; Murphy, Tr. 5/19/94 at 229-233; Petitioner's exhibit 24).

97. In early July, a National mechanic, Joseph Budaji, was attempting to drive a National bus from the maintenance shop at 70th Street back to the airport. On the highway, Johnson cut in front of his bus then dropped back to the buses' side so that the employee was unable to make the airport exit. Then, Johnson used this maneuver to force Budaji to drive the bus through Philadelphia. At one point Johnson, directly in front of the National bus, braked abruptly at the crest of a small bridge while a tractor-trailer was immediately behind the bus. Budaji was forced to lock his brakes to avoid hitting Johnson's car, and was almost hit by the tractor-trailer behind him.

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[27] McGee and Johnson testified that Smith pushed McGee without provocation. Johnson further testified that he did intercede on McGee's behalf and that he and Smith began to wrestle, but that no punches were exchanged. (McGee, Tr. 5/20/94 at 78-82; Johnson, Tr. 5/26/94 at 9-12). McGee's and Johnson's testimonies are not credible.

[28] Fanelli and McGee both denied that they ever pounded on Murphy's car and testified that on April 14, 1993, they did she her leave the one gate and immediately reenter the next gate. They further testified that a police officer arrived shortly thereafter and asked if they had pounded on Murphy's car, which they both denied doing. (McGee, Tr. 5/20/94 at 83-86; Fanelli, Tr. 520/94 at 97-98). I do not find Fanelli's and McGee testimony of the event to be credible.

Budaji then returned to 70th Street.[29] (Budaji, Tr. 5/19/94 at 220-223).

98. On or about July 24, 1993, National's fleet manager Dennis Durning stopped briefly, with his wife and two children, at the 70th Street facility to pick up some paperwork. As they left the site driving onto Norwitch Avenue, Fanelli got into his car, made a fast U-turn with his tires squealing, drove up alongside Durning, where, screaming, he shook his fist out his open window at Durning. Norwitch Avenue quickly comes to an end at an intersection with 70th Street, at which point Durning turned left, with Fanelli immediately to his right. Fanelli stayed to Durning's right while the two cars executed the turn, with the result being that Fanelli drove on the shoulder. Fanelli pulled back onto the roadway and struck Durning's left rear bumper, causing significant damage. Fanelli then backed up and drove away. Durning's family, particularly his children, were deeply upset by the incident. Durning notified the police. When Fanelli was contacted by the police he told them that he was not involved in an accident with Durning. As a result, Durning was ticketed for filing a false police report, which was dropped when he presented a videotape showing that Fanelli had followed him that day, and

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[29] Johnson testified that he did follow Budaji, but at no time did he drive dangerously in front of Budaji, as he trailed him the entire time. (Johnson, Tr. 5/26/94 at 13-14). I do not find Johnson's testimony credible, especially in light of a video showing Johnson driving recklessly and dangerously while engaging in ambulatory picketing during the Beaver College strike. (Petitioner's exhibit 44).

[30] Fanelli testified that he followed Durning that day, but he did not hit Durning's car. Fanelli further testified that he did cooperate with the police when notified. (Fanelli, Tr. 5/20/94 at 98-99). Fanelli's testimony of the incident is not credible. Not only is his testimony inconsistent with Durning's testimony and a video of the event, but it is also inconsistent with the police report that was introduced by the Union. The report indi-

had hit his car.[30] (Durning, Tr. 5/19/94 at 199-203; Petitioner's exhibit 25).

E. BEAVER COLLEGE

99. Beaver College is located in Glenside, Pennsylvania, northwest of Philadelphia. The Union represents approximately thirty service and maintenance employees. They went on strike on October 18, 1993, and continues on strike to date. The striking employees and nonemployee volunteers, picketed around the perimeter of the campus. As did Drexel and National, Beaver hired SRC to maintain order and safety during the strike, as well as to document any misconduct with incident reports and videotape. (Norris, Tr. 5/26/94 at 48-49).

100. SRC guards appeared on campus on October 19, 1993, the second day of the strike. Tactical Officer Andrew Norris was making a tour of the campus perimeter, to look for anything dangerous and to familiarize himself with the site, when he found himself across the property line from a group of pickets, including Gravinese, who volunteered at this strike as he had at New Kensington. Norris had been writing down notes about the terrain. Gravinese grabbed for Norris's pen but could not get it. Gravinese grabbed again and snatched the top off of Norris's pen, raking it across Norris's hand, scraping deeply enough to draw blood. Gravinese told Norris that if he encountered Norris on the other side of the picket line, i.e., off Beaver College property, he would kick Norris's ass, and that he would tie Norris up and fuck him. (Norris, Tr. 5/26/94 at 54-62; petitioner's exhibits 32 and 33).

101. On December 1, 1993, Gravinese followed Dean Young, a replacement worker hired to pick up trash during the strike, as he left campus on foot at the end of his shift.

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cates that right front fender of Fanelli's car was damaged, which would be consistent with Durning's testimony. (Respondent's exhibit 24).

Gravinese tailed directly behind Young, taunting him with comments such as "low life scab, you fucking scab," and "Your father's a faggot and your mother is a dick sucking whore." Gravinese picked up a trash bag containing cans and other debris and threw it at Young, hitting him in the leg and said, "Pick up the trash you fucking scab." Gravinese then kicked a bottle at Young, which also struck him in the leg. Young kept walking, trying to ignore Gravinese. As he continued away from campus, Gravinese bumped into him and said right in his face, "Let's go. It's just you and me, you fucking scab." Young continued walking and Gravinese followed him a while longer, then left. (Young, Tr. 5/26/94 at 171-177; Petitioner's exhibits 34 and 45).

102. On December 8, 1993, Beaver College employee Angela Senior was leaving campus in her car with her mother, Ersel Senior, and her aunt. Coming through the gate, they encountered picket Tim Phillips, who ran up to the driver's side and began yelling loudly at the car's occupants. While Phillips was doing this, he reached into his jacket pocket and pulled out a long knife, flashed it briefly so that Ersel Senior could clearly see it, then returned it to his pocket. Angela Senior only saw Phillips reach toward his pocket, but saw no knife because she was concentrating on watching the traffic. However, as soon as she passed the gate her mother, who was then in an agitated state, told her about having been threatened with the knife. Upon hearing that, Angela Senior immediately returned to the campus and filled out an incident report with the SRC guards and a police report. (A. Senior, Tr. 5/26/94 at 106-108; E. Senior, Tr. 5/26/94 at 116-125; Petitioner's exhibits 35 and 37).

103. On December 8, 1993, SRC tactical officer Fred Spivey was on duty at the entrance designated by SRC as the C gate,[31] when picket Eric Baylor said to him that he knew the

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[31] There are four roadways leading into campus. SRC designated the main entrance, off Easton Road, Gate A, the adjacent exit,

hotel the SRC employees were staying in and that he would meet Spivey there and shoot him, making a gesture toward his pocket as if to pull something out of it. (Spivey, Tr. 5/26/94 at 144-145; Petitioner's exhibits 41 and 42).

104. On December 14, 1993, at 10:00 am., a group of pickets including Eric Pugh and Phillips engaged in headlight to headlight picketing directly in front of a McKeon Company dump truck, preventing it from entering the main gate to the campus, Gate A. At one point, one of the pickets yelled to the truck driver, "Run me over." After approximately ten minutes of being blocked in this manner, the truck left. (Aeschbacher, Tr. 5/26/94 at 157-162; Petitioner's exhibits 43 and 44).

105.Approximately one hour later, a McKeon dump truck attempted to enter the campus at the C gate. There, pickets Pugh and Robert Smallwood picketed directly in front of the truck, blocking its entry. The McKeon driver asked the pickets to move to let him through; they did not. Instead, Pugh leaned against the front of the truck then lay down in the street in front of the truck and demanded medical attention. An ambulance eventually arrived and bore Pugh away. In all, the McKeon truck was blocked for approximately thirty minutes.[32] (Hruz, Tr. 5/26/94 at 181-186; Petitioner's exhibits 44

Gate B, and the two Church Road entrances at the far end of campus, Gates C and D. There is also a stone archway over a pedestrian entrance on Easton Road, which the SRC guards called Blake. (Norris, Tr. 5/26/94 at 64-65).

[32] Pugh admits that he was blocking the truck by picketing directly in front of it. However, he claims that the truck sat idly on Church Road for five minutes while he picketed, then suddenly advanced, going over ten miles per hour, and knocked him down. (Pugh, Tr. 5/27/94 at 53, 65). When confronted with the videotape which shows the dump truck idling while the driver yells to the pickets to please move, and does not show the truck advancing when Pugh falls in front of it, he responded that he might have been "in shock" at the time. (Pugh, Tr. 5/27/94 at 68).

Furthermore, Pugh's injury appeared to be staged. First, from the evidence of the videotape, he is seen to deliberately lean against the truck and

and 46).

106. On December 10, 1993, in the early morning, SRC tactical officers Patrick Brown and Cary Pinnell were driving a truck picking up supplies for Beaver College's cafeteria. They were followed on these rounds by Phillips, driving a green truck, Pugh, driving a white Chevrolet sedan, and Johnson, driving a white Cadillac. As they were heading toward a bakery in Camden, Johnson turned off, but Pugh and Phillips continued to follow them. Later, at approximately 3:50 a.m., Johnson rejoined them, veering abruptly into the Beaver College truck's path. Johnson drove in front of the truck, Pugh took up position to its right and Phillips to its rear. At one point, Johnson moved over to a lefthand lane, then when the truck attempted to pass him, moved back into the lane just in front of them. Johnson continued to drive in this manner, swerving back and forth in front of the truck and slamming his brakes while in proximity to the front of the truck, with no apparent legitimate reason.[33] (Brown, Tr. 5/27/94 at 205-213; Petitioner's exhibits 44 and 49).

107. On April 11, 1994, picket Eric Baylor and other Union pickets blocked a truck attempting to enter Gate A by picketing directly in front of it without clearing the truck's path.

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then lay down irrespective of any motion by the truck. Second, his fall itself is slow and deliberate. Third, Smallwood, picketing with him, did not react at all to this supposed accident, but simply continued to picket as though nothing had happened, and when Tim Phillips appears on the scene, he is seen to bend over Pugh briefly, but administer nothing in the way of first aid. (Petitioner's exhibit 44).

Finally, Pugh's propensity to engage in blatant blocking was shown by the videotape of his picketing on April 1, 1994, at 2:35 pm. at Gate A, walking in front of a flatbed truck with another picket, in such a manner that at no time could the truck move past them. (Pugh, Tr. 5/27/94 at 62-64; Petitioner's exhibit 48).

[33] Johnson admits that he was following the truck that night with Pugh and Phillips. He explains that he dropped off at one point due to a flat

After being blocked this way for a while, the truck driver attempted to inch forward. Baylor did not get out of the truck's way, and was contacted by the truck's front bumper. He still did not get out of the way, but instead pushed back against the truck. When the truck again tried to inch forward, Baylor laid down directly in front of it, partially beneath the front bumper. He stayed in this position for several minutes, occasionally waving his arm to the driver, motioning him to proceed. While doing this, Baylor yelled, "Go ahead and run me over." Eventually, the truck backed up and left. (Hautekeete, Tr. 5/26/94 at 194-196; Petitioner's exhibits 47 and 48).

108. On April 20, 1994, Richard Repetto, an independent landscape contractor, was on his way with his wife, Mollie, to a doctor's appointment, when they got lost. Repetto drove into the front gate of Beaver College to ask directions. As they crossed the threshold into the campus, three pickets who had been sitting in chairs off to the right came running over to the truck. One stood in front of it and grabbed onto the plowframe mounted there. Mollie Repetto, who was sitting in the passenger seat, rolled down her window to inform the picket hanging onto the front of the truck that they were lost and only there to ask for directions. Meanwhile, a second picket ran over to the passenger side of the truck. Mollie Repetto could see in her side mounted mirror as this second picket delivered a sharp kick to the side panel of the truck. The Repettos were then able to enter the campus. When they got out to inspect the truck, they saw a large dent in the right panel, precisely boot-shaped. The estimate to repair the truck's body damage is

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tire, but was able to rejoin the others because he was keeping in contact with Pugh and Phillips by radio. He denies veering back and forth in front of the truck, even though that is evidenced by the videotape, and attributes his sporadic application of his brakes to "very heavy fog" and to fatigue. The videotape did not show heavy fog. (Johnson, Tr. 5/27/94 at 21-24; Petitioner's exhibit 44).

$1,579.93.[34] (Repetto, Tr. 5/26/94 at 129-136; Petitioner's exhibits 37, 38 and 39).

109. On April 25, 1994, Beaver College employee James Roots encountered Johnson, Pugh and Robert Smallwood in a public transportation station on his way home from work. A Roots was about to go through the turnstile, Johnson said to him, "Hey scab, what's up?" Roots responded, "Getting paid." Pugh then swung at Root's head, but missed. Roots swung back, hitting Pugh in the nose, and they wrestled each other to the floor. Police then intervened and broke up the fight. (Roots, Tr. 5/26/94 at 220-222)

CONCLUSIONS OF LAW

A. Jurisdiction

The union respondent is a labor organization as defined under the Act and is subject to the courts jurisdiction. 29 U.S.C. § 152(5). At all material times herein, the judgement of

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[34] The Union does not dispute that one of its pickets kicked the Repetto's truck, but relates the circumstances differently. Thus, Johnson testified that he, along with volunteer pickets Charles Walton and Brian Dykes, were standing on the pavement, picketing, when they saw the Repetto truck approaching. According to Johnson, the truck then rushed at Dykes and ran him over. Then, according to Johnson, the truck, still accelerating, carried Dykes ten to fifteen feet onto to Beaver College's lawn. It was then, according to Johnson, that Dykes recovered quickly and kicked the truck. (Johnson, Tr. 5/27/94 at 14-18).

Dykes testified that, as Mollie Repetto said, he, Johnson and Walton were sitting off to the side in chairs when the truck approached, and that he began picketing when the truck entered the gate. Contrary to Johnson's testimony, Dykes admitted that the truck was moving so slowly that he was able to picket back and forth, headlight to headlight, three or four times in front of it. Dykes further testified, that the truck was inching forward, and contacted him while he was towards the driver's side of the bumper, and that he got up, walked around the front of the truck, and kicked the truck. (Dykes, Tr. 5/27/94 at 45-47). Dykes said nothing about being run over, or dragged onto the lawn pitched on the truck's plowframe.

this court, entered June 19, 1986 has been in full force and effect. Local 115, through its officers and agents, has had notice and actual knowledge of the terms of the June 19, 1986 order. The order tracks the language of § 8(b) (1) (A), 29 U.S.C. § 158 (b) (1) (A), and directs the Union and its officers, agents and representatives to cease and desist from restraining or coercing employees of any employer by: obstructing, blocking and preventing ingress and egress of vehicles, employees and other persons from the premises of any employer; threatening employees or other individuals with violence or other reprisals; assaulting or striking employees or other individuals or throwing or brandishing objects at them; causing damage to vehicles or other property; mass picketing, pushing, shoving chasing or spitting at employees or other individuals; or in any other manner restraining or coercing employees of any employer in violation of § 8(b) (1) (A) of the Act.

B. Burden of Proof

In a civil contempt matter, the Board must prove by clear and convincing evidence that the Union violated this Court's order. McComb v. Jacksonville Paper Co., 336 U.S. 787 (1948); NLRB v. Local 825, A, B, C, D, International Union of Operating Engineers, 659 F.2d 379, 384 (3d Cir. 1981).

Civil contempt actions are further governed by 29 U.S.C. § 106 which provides:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held liable in any court of the United States for the unlawful acts of individual officers, members or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

The purpose of this section is to prevent federal judges from halting strikes by means of sweeping injunctions. United

States Steel Corporation v. United Mine Workers of America, 519 F.2d 1236, 1242 (5th Cir. 1975).

The Supreme Court has also held that in order for a union to be held responsible for its pickets actions it must be shown "...that the union approved the violence which occurred, or that it participated actively or by knowing tolerance in further acts..." United Mine Workers v. Gibbs, 383 U.S. 715, 739 (1966).

The National Labor Relations Board has given valuable guidance in determining liability. The Board has held that a union is responsible for misconduct committed by its designated agents, such as officers and business agents, whether on or off the picket line. See Carpenters District Council (E. Allen Reeves, Inc.), 281 N.L.R.B. 493, 497-498 (1986); Teamsters Local 327 (Coca-Cola Bottling Works of Nashville), 184 N.L.R.B. 84, 95 (1970).

Traditionally, the Board applied general principles of agency law and found the union liable where it is shown that the union, either actually or implicitly, authorized the picket's conduct beforehand or ratified the conduct after it occurred. Teamsters Local 860 (Delta Lines), 229 N.L.R.B. 993, 994 (1977); Soft Drink Workers Union Local 812, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 304 N.L.R.B. 111, 112 (1991). The Board has also held that:

> When a union authorizes a picket line, it is required to retain control over the picketing. If a union is unwilling or unable to take the necessary steps to control its pickets, it must bear the responsibility for their misconduct.

Avis Rent-a-Car System, Inc., 280 N.L.R.B. 580 n. 3 (1986). Where there is a continuing pattern of misconduct, and even though the union does not participate nor observe the misconduct they will still be found liable, if they did not take any steps to prevent the misconduct. Dover Corporation, Norris Division, 211 N.L.R.B. 955, 956-957 (1974), enf'd. as

modified, 535 F.2d 1205 (10th Cir. 1976), cert. denied, 429 U.S. 978 (1976).

Ambulatory picketing is governed by the same rules as picket lines. Therefore, a union may be found liable for any misconduct that occurs during ambulatory picketing. Soft Drink Workers Union Local 812, 307 N.L.R.B. 1267, 1272 (1992).

C. The Union violated § 8(b) (1) (A) of the Act and ¶ (a) (1) of the Third Circuit's Order by obstructing blocking, and preventing ingress and egress of vehicles, employees and other persons at the premises of any employer because such employees or other individuals have crossed or attempted to cross the Union's picket lines.

"It is well settled that picketing which interferes with or blocks the ingress and egress of employees and others at a place of employment, or which, in effect, forces employees to 'run a gauntlet,' is inherently coercive and in contravention of the Act." National Labor Relations Board v. United Mine Workers of America, 429 F.2d 141, 146 (3rd Cir. 1970), citing, American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 205-207, 42 S.Ct. 72, 66 L.Ed. 189 (1921); Hughes v. Superior Court of California for Contra Costa County, 339 U.S. 460, 466, 70 S.Ct. 718, 94 L.Ed. 985 (1950).

The NLRB has proven by "clear and convincing" evidence that the Union has violated ¶ (a) (1) of the Third Circuit's Order at all five of the struck employers.

Union pickets would frequently: prevent Michael Klambara from leaving the Service America parking lot; prevent food deliveries at Drexel; block the ingress and egress of buses at National; and block trucks attempting to enter Beaver College's campus. On one occasion at Drexel, Johnson, a union employee, was leading the pickets in blocking a food delivery. Also at Drexel, pickets blocked a UPS delivery and Santangelo truck from leaving a parking lot.

Harold Fisher, a Union employee, blocked a Service

America truck as it was attempting to leave the Budd Company for twenty minutes. Fisher pretended to be hit by the truck and laid down in front of it. This tactic was used at other strike sites. At the Drexel strike, Vance pretended to be hit by a truck to prevent it from entering Drexel's Campus. And at Beaver College, Pugh and Baylor both pretended to be hit by trucks in an effort to block the trucks from entering campus.

Union pickets would force customers and employees of New Kensington and National, who chose to cross the picket line, to "run a gauntlet" in order to enter their facilities. This behavior is not only in violation of the Third Circuit's order, but is the classic example of obstructing ingress and egress of an employer as described in the United Mine Workers of America case, which is in violation of § 8(b) (1) (A) of the Act.

Each of these instances of blocking is "inherently coercive and in contravention of the Act," and therefore in violation of the Third Circuit's order. United Mine Workers of America, supra.

Both Fisher and Johnson are agents of the Union. As agents both men would have actual knowledge of and be bound by the Third Circuit's order. Since it has been shown by "clear and convincing" evidence that both men engaged in blocking, they are each in contempt of ¶ (a) (1) of the Third Circuit's order. McComb, supra.

While it has not been shown that the Union authorized these incidents of blocking beforehand, it was a continuing pattern of misconduct in which the Union did not take any steps to prevent. Applying the principal announced in Dover, supra, the Union is liable for the misconduct of their pickets.

Also, the Union had constant supervision of the picket lines by their agents, so they would have had actual knowledge of the events afterwards. Yet these acts continued daily and from strike to strike, indicating "tolerance" for further acts. Under Gibbs, supra, the Union's tolerance of unlawful acts of their

pickets makes the Union liable for these acts. Therefore, the Union is in contempt of ¶ (a) (1) of the Third Circuit's order.

D. The Union violated § 8 (b) (1) (A) of the Act and ¶ (a) (2) of the Third Circuit's Order by threatening employees or other individuals with violence or other reprisals because such employees or other individuals have crossed or attempted to cross the Union's picket lines.

Threats, intimidation and physical abuse are in clear violation of § 8(b) (1) (A). N.L.R.B. v. Taxicab Drivers Union, Local 777, 340 F.2d 905, 909 (7th Cir. 1964); N.L.R.B. v. Dressmakers Joint Council, International Ladies' Garment Workers Union, AFL-CIO, 342 F.2d 988 (2d Cir. 1965), enforcing, 146 NLRB 559 (1964).

In Local 542, International Union of Operating Engineers v. N.L.R.B, 328 F.2d 850, 852-853 (3d Cir. 1964), cert. denied, 379 U.S. 826 (1964), the Court announced the test for union coercion and intimidation in violation of § 8(b) (1) (A):

> That no one was in fact coerced or intimidated is of no relevance. The test of coercion and intimidation is not whether the misconduct proves effective. The test is whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act.

The Third Circuit later extended this test to threats and intimidation by individual strikers. N.L.R.B. v. W.C. McQuaide, Inc., 552 F.2d 519, 528 (3d Cir. 1977).

While § 8(b) (1) (A) speaks to restraint or coercion of employees, it has been extended to nonemployees when it is witnessed by employees or takes place in circumstances such that employees are likely to learn about it. N.L.R.B. v. Union National de Trabajadores, 540 F.2d 1, 6 (1st Cir. 1976), cert. denied, 429 U.S. 1039 (1977) (conduct likely to come to the attention of employees); Brooklyn v. Spring Corporation, 113 NLRB 815 (1955), enf'd, 233 F.2d 539 (2d Cir. 1956). The employees who witness or learn of misconduct may well be

those who are on the picket line and are making common with the malfeasors, however they may be coerced by the misconduct of their fellow strikers, whose actions signal the potential consequences of breaking ranks. See, N.L.R.B. v. International Woodworkers of America, AFL-CIO (W.T. Smith Lumber Co.), 243 F.2d 745, 747 (5th Cir. 1957).

Reckless driving has been held to be an implicit threat of bodily harm, in violation of § 8(b) (1) (A). Metal Polishers, Buffers, International 67 (Alco-Cad Nickel Plating Corp.), 200 NLRB 335.

The NLRB has shown by clear and convincing evidence that the Union has violated ¶ (a) (2) of the Third Circuit's Order at Service America, New Kensington, National and Beaver College strike sites.

The evidence shows that pickets from Service America drove recklessly on several occasion by boxing Klambara and Fromme on the highway, erratically altering speeds, and driving directly at Klambara. Similarly, Johnson also drove recklessly in front of National employees Budaji and SRC guard Brown and Pinnell, weaving back and forth in front of them, and suddenly hitting his breaks. These incidents of reckless driving are an implicit threat of bodily harm and in violation of § 8(b) (1) (A). Metal Polishers, supra.

The trial evidence also shows that pickets at National created hazardous driving conditions by dislodging the side mirrors on the buses, and by deliberately distracting the drivers as they left the lot and at other dangerous junctures on their route. The pickets would cause the side doors to open while the buses were operating, bumped into the buses, screamed at the drivers, threw mud and stones at Miller's bus, shone bright lights in Ginyard's eyes while she was driving, and cut in front of buses and slowed down abruptly while they were in route.

Finally, the evidence shows that at Service America, a picket wielded a baseball bat while awaiting Fromme's exit from the Soblar building; at New Kensington pickets bumped

Carpenter's car with theirs; at National, Donahue threatened Whittaker and that Fanelli and McGee pounded dents into the roof of Murphy's car; at Beaver College, Phillips flashed a knife at the Seniors while screaming at them, and Baylor threatened to shoot Spivey. Gravinese alone threatened to: lynch Cory; sodomies Carpenter and LaFontaine; run over Carpenter; bind and sodomies Norris; and fight Young.

The pickets "must be presumed to have intended the natural and reasonably foreseeable consequences of their acts," N.L.R.B. v. Local 140, United Furniture Workers of America, CIO, 233 F.2d 539, 541 (2d Cir. 1956), which was to threaten and intimidate those individuals who crossed or attempted to cross the picket line. While not all of these incidents were directed at employees, it is certain that the employees were likely to learn of the incidents and, therefore, § 8 (b) (1) (A) would apply. Union National de Trabajadores, supra. These incidents are a clear violation of § 8(b) (1) (A) of the Act. Taxicab Drivers Union, supra.

Again it can not been shown that the Union authorized these incidents of threats and intimidation beforehand, however it was a continuing pattern of misconduct in which the Union did not take any steps to prevent. Applying the principal announced in Dover, supra, the Union is liable for the misconduct of their pickets. Under Gibbs, supra, the Union's tolerance of unlawful acts of their pickets also makes the Union liable for these acts.[35] Therefore, the Union is in contempt of ¶ (a) (2) of the Third Circuit's order.

As an agent Johnson had actual knowledge of and is bound by the Third Circuit's order. Since it has been shown by "clear and convincing" evidence that Johnson engaged in threats and

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[35] It is especially disturbing that when the original NLRB petition was filed it alleged misconduct on the part of Gravinese, yet the Union still let him on the Beaver College picket line.

intimidation, he is personally in contempt of ¶ (a) (2) of the Third Circuit's order. McComb, supra.

E. The Union violated § 8(b) (1) (A) of the Act and ¶ (a) (3) of the Third Circuit's Order by assaulting or striking employees or other individuals or throwing or brandishing objects at them because such employees or other individuals have crossed or attempted to cross the Union's picket lines.

Threats, intimidation and physical abuse are in clear violation of § 8(b) (1) (A) . N.L.R.B. v. Taxicab Drivers Union, Local 777, 340 F.2d 905, 909 (7th Cir. 1964); N.L.R.B. v. Dressmakers' Joint Council, International Ladies' Garment Workers Union, AFL-CIO, 342 F.2d 988 (2d Cir. 1965), enforcing, 146 NLRB 559 (1964).

The NLRB has shown by clear and convincing evidence that the Union has violated ¶ (a) (3) of the Third Circuit's Order at New Kensington, Drexel, National and Beaver College strike sites.

The evidence shows that Gravinese assaulted Bercon employee Cory by throwing stones at him, and that Gravinese and Davis assaulted Valentine by striking him with the front door. Further, Gravinese, Davis, and other pickets repeatedly bumped, kicked, and tripped Carpenter, LaFontaine, Valentine, and the Bercon employees. The evidence also showed that at Drexel pickets shoved Adams, that Mulvihill shoved a Civil Affairs officer, that pickets assaulted Coulson, and that Johnson punched Curtney Smith. Finally, the evidence showed that at Beaver College, Gravinese threw and kicked debris at Young and that Pugh assaulted Roots in Johnson's presence. All of these incidents are a clear violation of § 8 (b) (1) (A) of the Act. Taxicab Drivers Union, supra.

Again it can not been shown that the Union authorized these incidents of threats and intimidation beforehand, however it was a continuing pattern of misconduct in which the Union did not take any steps to prevent. Applying the principal

announced in Dover, supra, the Union is liable for the misconduct of their pickets. Under Gibbs, supra, the Union's tolerance of unlawful acts of their pickets also makes the Union liable for these acts. Therefore, the Union is in contempt of ¶ (a) (3) of the Third Circuit's order.

As an agent Johnson had actual knowledge of and is bound by the Third Circuit's order. Since it has been shown by "clear and convincing" evidence that Johnson engaged in physical abuse, he is personally in contempt of ¶ (a) (3) of the Third Circuit's order. McComb, supra.

F. The Union violated § 8(b) (1) (A) of the Act and ¶ (a) (4) of the Third Circuit's Order by causing damage to vehicles or other property because employees or other individuals have crossed or attempted to cross the Union's picket lines.

It is well established that "destruction of the employer's property restrains the employees in the exercise of their rights under Section 7 by threatening their jobs and by creating a general atmosphere of fear and 'violence." Union National de Trabajadores, supra at 10; United Mine Workers of America, supra at 147-148; New Power Wire & Electrical Co. v. NLRB, 340 F.2d 71, 72 n. 1 (2d Cir. 1965). "Moreover, the destructive acts need not be done in the actual presence of employees since they will ultimately learn of them." United Mine Workers of America, supra at 148-149; Local 140, United Furniture Workers of America, 233 F.2d 539, 541 (2d Cir. 1956).

The NLRB has shown by clear and convincing evidence that the Union has violated ¶ (a) (4) of the Third Circuit's Order at Service America, New Kensington, National and Beaver College strike sites.

The evidence showed that pickets glued locks on the Service America trucks and vending machines.[36] The evidence further

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[36] The evidence of this property damage is circumstantial, however

showed that pickets inflicted damage to Dennis During's car and to the Repettos' truck. In direct violation of the Third Circuit's Order and in violation of § 8(b) (1) (A) by causing an "atmosphere of fear and violence." Union National de Trabajadores, supra at 10; United Mine Workers of America, supra at 147-148; New Power Wire & Electrical Co. v. NLRB, supra, at 71, 72 n. 1.

Though it can not been shown that the Union authorized these destructive acts beforehand, it was a continuing pattern of misconduct in which the Union did not take any steps to prevent. Applying the principal announced in Dover, supra, the Union is liable for the misconduct of their pickets. Under Gibbs, supra, the Union's tolerance of unlawful acts of their pickets also makes the Union liable for these acts. Therefore, the Union is in contempt of ¶ (a) (4) of the Third Circuit's order.

> G. The Union violated § 8(b) (1) (A) of the Act and ¶ (a) (5) of the Third Circuit's Order by engaging in mass picketing, pushing, shoving, chasing, or spitting at employees or other individuals because such employees or other individuals have crossed or attempted to cross the Union's picket lines.

The NLRB has shown by clear and convincing evidence that the Union has violated ¶ (a) (5) of the Third Circuit's Order at Service America, New Kensington, and National strike sites.

The evidence shows that pickets, numbering up to twenty-five, massed around Klambara virtually every night as he left the Service America facility, and spat at him repeatedly. At New Kensington, the Union regularly had up to twenty pick-

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the pattern of similar damage at different strike sites indicates a coordinated Union tactic, making the circumstantial evidence very strong. "It is reasonable to infer from the strong circumstantial evidence that one of the picketers committed the act(s)." Teamsters Local 812, 304 NLRB at 116.

ets in front of its narrow store-front, and these massed pickets bumped and kicked employees and other individuals. At National, the Union regularly had up to fifty pickets at the airport facility. Bus drivers and managers had to work their way through this hostile crowd, as did customers and others. Also, at National, the coercive character of the picketing was intensified by the incessant personalized verbal taunting.

Once again, it can not been shown that the Union authorized these incidents of mass picketing, pushing, shoving, and spitting at employees, however it was a continuing pattern of misconduct in which the Union did not take any steps to prevent. Applying the principal announced in Dover, supra, the Union is liable for the misconduct of their pickets.

Also, the Union had constant supervision of the picket lines by their agents, so they would have had actual knowledge of the events afterwards. Yet these acts continued daily and from strike to strike, indicating "tolerance" for further acts. Under Gibbs, supra, the Union's tolerance of unlawful acts of their pickets makes the Union liable for these acts. Therefore, the Union is in contempt of ¶ (a) (5) of the Third Circuit's order.

The Union's Defenses

The Union's post trial brief raises several procedural and substantive legal defenses to the NLRB's contempt allegations. Their procedural defenses are based on due process concerns and the fact that the employers withdrew the underlying charges. They raised the following substantive legal defenses:

1. Agency;
2. Presence of Employees;
3. Provocation;
4. Substantial Compliance;
5. Impossibility of Compliance; and
6. Parameters of Picket Line Activity.

A. Procedural Defenses

The Union contends that since the employers withdrew their

unfair labor practice charges this estopps the NLRB from going forward on a contempt petition based on Gompers v. Buck' s Stove & Range Co., 221 U.S. 418 (1911) (when the parties settle the underlying cause of action, the grounds for civil contempt and any other proceeding that was dependent upon it also settled out). This claim is without merit and does not prevent the NLRB from pursuing contempt charges against the Union.

It is well settled that only the NLRB is authorized to initiate contempt proceedings to compel compliance with decrees enforcing its orders. Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 264-265, 269-270 (1940). Gompers also held that civil contempt proceedings are "between the original parties and are instituted and tried as part of the main cause." Gompers, supra at 451. The only parties in this case are the Board, the Union, and the Additional Respondents in Contempt, the five employers are not parties to this proceeding.

The private settlement of the five employers cannot prevent the Board from seeking a contempt order, especially when the five employers could not initiate proceedings for contempt of the Third Circuit's order. see Amalgamated Utility Workers, supra; Local 283 v. Scofield, 382 U.S. 205 (1965). As the First Circuit correctly summarized:

> ...When the Board seeks compliance with a previous order it is not merely vindicating the interests of the parties injured by the contumacious conduct, but is seeking to prevent the recurrence of unlawful behavior that has already injured the interests of numerous other parties. The Board's pursuit of this public interest should not be prevented by an agreeable adjustment of private affairs.

N.L.R.B. v. Union National de Trabajadores, 611 F.2d 926, 932-933 (1st Cir. 1978). Applying the above principles, the Union's defense is without merit.

The Union next claims that because of due process concerns

regarding the lack of adequate discovery should be cause to dismiss this petition in its entirety.[37] This claim is completely without merit. The Union had adequate time to engage in discovery before the hearings commenced, but chose not to conduct any discovery. Instead, they asked the Special Master to order the Petitioner to produce witness statements made to Board investigators. When their motion to compel was denied they then motioned the Third Circuit to instruct the Special Master to allow more time for discovery. When this motion was denied they finally began issuing subpoenas, a year after the original contempt motion was filed and five months after the Special Master ordered discovery to continue.

After direct examination of each Board witness the Union was presented a copy of the witnesses statement to the Board, if one was made, and given whatever time they needed to prepare for cross examination. The Union does not offer any explanation on how this prejudiced their defense. Therefore, the Union's claim that they were denied adequate discovery in violation of due process concerns is without merit.

B. Substantive Legal Defenses[38]

Although a union is responsible for the mass action of its members, this does not revoke the traditional defenses to a contempt adjudication. Washington Metropolitan Area Transit Authority v. Amalgamated Transit Union, 531 F.2d 617, 621

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[37] The Union also claims that according to United Mine Workers v. Bagwell, 62 USLW 4705 (1994), that this is not a civil contempt proceeding, but a criminal contempt proceeding and, therefore these proceedings where improper and must be dismissed. On July 13, 1994, the Union presented this exact argument to the Third Circuit in a motion to dismiss. On September 2, 1994, the Third Circuit denied the motion to dismiss, therefore the issue is moot and need not be decided by the Special Master.

[38] All of the substantive legal defenses, except substantial compliance and impossibility of compliance were rejected in the Conclusions of Law section and, therefore, need not be addressed in this section.

(D.C. Cir. 1976). Either substantial compliance or the inability to comply is as much a defense in coercive contempt proceedings arising out of labor disputes as in any other civil contempt proceeding. Id.

The Union first asserts that they have substantially complied with the court's order and therefore cannot be found in contempt. This claim is without merit.

The standard for evaluating substantial compliance is that the defendant must demonstrate reasonable diligence and energy in attempting to accomplish what the court ordered. Halderman v. Pennhurst State Schools Hospital, 154 F.R.D. 594, 608 (E.D. Pa. 1994); see also Merchant v. Evans, No. 90-7973, 1991 WL 26165 at *1 (E.D. Pa. Dec. 6, 1991). Substantial compliance means more than a simply a good faith effort. Halderman at 608. The court must evaluate the Order and efforts of the alleged contemnors to determine if they used the required reasonable diligence and energy to comply with the order. "If a violating party has taken all reasonable steps to comply with the court order, technical or inadvertent violations of the order will not support a finding of civil contempt." General Signal Corp. v. Donallco. Inc., 787 F.2d 1376, 1379 (9th Cir. 1983), citing Vertex Distributing v. Falcon Foam Plastics, Inc., 689 F.2d 885, 891-92 (9th Cir. 1982).

In the instant case, the Union has not even made a good faith effort to comply with the order. The evidence is overwhelming that the Union engaged in a pattern of behavior that could hardly be classified as a "technical or inadvertent violation." Therefore, the Union's claim that they substantially complied is without merit.

The Union final defense is that of impossibility of compliance. In a civil contempt proceeding, the defendant must assert a present inability to comply with the order in question. United States v. Rylander, 460 U.S. 752, 757 (1983). "While the court is bound by the enforcement order, it will not be blind to evidence that compliance is now factually impossi-

ble." Id.

In any event, the burden is on the Union to show categorically and in detail why it is unable to comply. Hicks v. Feiock, 485 U.S. 624, 637-638 (1988); Maggio v. Zeitz, 333 U.S. 56, 75-76, 68 S.Ct. 401, 92 L.Ed. 476 (1948). Mere inconvenience or difficulty is not enough to permit a party subject to an injunctive decree to escape compliance. Rather, the impossibility must be "physical" or "literal" in nature.

In the instant case the order does not ask anything more than obedience to the law. The Union does not show "categorically and in detail" why they cannot comply with the law. Therefore, this defense is without merit.

CONCLUSION

The Board has shown by clear and convincing evidence that the Union violated the Third Circuit's June 19, 1986 Order at Service America, New Kensington, Drexel University, National, and Beaver College strike sites. The Union's procedural and substantive legal defenses are without merit. Wherefore, I make the following:

RECOMMENDATION

It is recommended that the petition seeking to find Teamsters Local 115, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, along with Harold Fisher and Jocko Johnson in contempt of the Court's Order of June 19, 1986 be GRANTED.

TULLIO GENE LEOMPORRA
UNITED STATES MAGISTRATE JUDGE

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3628
J-1876

NATIONAL LABOR RELATIONS BOARD,
Petitioner

vs.

TEAMSTERS LOCAL 115,
a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondent

On Application for Enforcement of an Order of the
National Labor Relations Board
Docket Nos. 4-CB-4845 and 4-CB-4845-2
275 NLRB No. 1547 Spielberg/MARSH

Submitted Pursuant to Third Circuit Rule 12(6)
June 19, 1986

Before: Seitz, Hunter and Mansmann, Circuit Judges

(Filed June 19, 1986)

MEMORANDUM OPINION

MANSMANN, Circuit Judge.

This appeal comes before the court on application of the National Labor Relations Board ("NLRB") for enforcement of its order against Teamsters Local Union 115 ("the union"). Local 115, International Brotherhood of Teamsters and Gross Metal Products, Inc., 275 N.L.R.B. No. 220 (1985). We possess jurisdiction pursuant to §10(e) of the National Labor Relations Act ("the Act"), as amended. 29 U.S.C. §160(e). We will enforce the order of the NLRB.

I.

Gross Metal Products fabricates metal at its Philadelphia, Pennsylvania plant. On March 1, 1984, most of its fifty employees struck after the company's president refused to recognize the union as their bargaining agent. For the ensuing six months, the union maintained a violent picket line.

The Court of Common Pleas of Philadelphia County on March 29, 1984 preliminarily enjoined the strikers from, inter alia, participating in mass picketing, blocking plant entrances and exits, and engaging in threats and attacks on the employer. Nonetheless, the defendant's misconduct continued.

Gross Metal Products filed with the Board two charges alleging unfair labor practices in violation of §8(b)(l)(A) of the Act. While these consolidated matters were before the NLRB, the Board sought and received a temporary injunction from the United States District Court for the Eastern District of Pennsylvania under §10(j) of the Act.

Following a hearing before an Administrative Law Judge on the consolidated charges, the union and counsel for the General Counsel to the NLRB entered into a stipulated settlement, and the General Counsel moved for the ALJ's approval.

The settlement included a narrowly-drawn cease and desist order and a non-admission of liability clause. On January 22, 1985, however, the ALJ denied approval and entered a broad remedial order supported by findings of some seventy-one incidents contravening §8(b)(1)(A). The NLRB upheld the ALJ's decision and order and presently seeks enforcement.

II.

The union advances two arguments in opposition to the issuance of the broadly-worded order. First, it contends that the facts fail to warrant a broad order; second, it urges that due process requires prior notice that a broad order might issue.

On review, the Board's remedy "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 540, rehearing denied, 320 U.S. 809 (1943). The NLRB has authority to restrain broadly potential encroachments on the Act if "they bear some resemblance to that which the [defendant] has committed, or [if] danger of their commission in the future is to be anticipated from the course of [its] conduct in the past." NLRB v. Express Publishing Co., 312 U.S 426, 437 (1941). The NLRB's order may cover employees besides those of the charging party where reasonable grounds exist for fearing misconduct against third parties. See NLRB v. Local 542, International Union of Operating Engineers, 329 F.2d 512, 516 (3d Cir. 1964). These findings, accordingly, must rest upon substantial evidence on the record as a whole. Universal Camera Corp. v. NLRB, 340 US. 474 (1951).

III.

The liberal provisions of §10(c) of the Act narrow our

review. The Supreme Court has observed that, in fashioning remedies under 29 U.S.C. §160(c),

> the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts. See Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964).

NLRB v. Gissel Packing Co., 395 U.S. 575, 612 n.32, rehearing denied, 396 U.S. 869 (1969), quoted in NLRB v. Atlas Microfilming Division of Sertafilm, Inc., 753 F.2d 313, 316 (3d Cir. 1985). We must honor the Board's action so long as it effects the Act's stated policy "to prevent, by encouraging and protecting collective bargaining and full freedom of association for workers, the costly dislocation and interruption of the flow of commerce caused by unnecessary industrial strife and unrest." Virginia Electric & Power Co., 319 U.S. at 539. The NLRB's order here—forbidding Local 115 from in any manner restraining or coercing employees of Gross Metal Products, Inc. or of any other employer in violation of §8(b)(l)(A)—manifests that end.

Concededly, however, such a broad order encounters other limits. First, its reach to safeguard not only Gross Metal Products but also "any other employer's" employees requires a reasonable basis for apprehending misconduct against strangers to this litigation. Local 542, International Union of Operating Engineers, 329 F.2d at 516. As we said in NLRB v. Local 107, Highway Truckdrivers and Helpers, 300 F.2d 317, 322 (3d Cir. 1962):

> A broad order is permitted where the evidence shows the existence of a general scheme, pattern or course of conduct contemptuous of the Act. NLRB v. Local 522, Lumber Drivers, 294 F.2d 811 (C.A. 3, 1961) [sic].

Here the Board rightly concurred with the ALJ that the union's misconduct affected the personnel of employers other than the charging party. The Board found that:

> Neutrals were forced to leave the facility without making pickups or deliveries. They were threatened with serious violence and told that the pickets would shut down their facilities as well. Nails were driven into truck tires. A radiator was smashed by an iron bar. A picket jumped onto a neutral's truck, ripping off the side view mirror. Hydraulic brake lines were cut. Truck strapping was cut. Bottles were thrown at neutrals' drivers. Another neutral's driver was felled by a blow to the head with a board.

275 N.L.R.B. No. 220. The active role of Local 115 officers in the nearly six dozen incidents of violence, moreover, proves an official policy of unlawful conduct. These facts substantiate the Board's encompassing neutral employees in its order. See Local 107, Highway Truckdrivers and Helpers, 300 F.2d at 322.

In addition, similar misconduct has marked Local 115 in the past. See Local 115, International Brotherhood of Teamsters (E.J. Lavino & Co.), 157 N.L.R.B. 1637 (1966); Local 115, International Brotherhood of Teamsters (Continental-Wirt Electronics), 186 N.L.R.B. 56 (1970); Local 115, International Brotherhood of Teamsters (Martin J. Sobol), 238 N.L.R.B. 1070 (1978); Local 115, International Brotherhood of Teamsters (Carol Lines, Inc.), (No. 4-CB-4649, decided March 19, 1984 and adopted April 24, 1984 in absence of exceptions).[1]

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[1] We agree with the union that the Board should not have considered the case of Local 115, International Brotherhood of Teamsters (Oakwood Chair Mfg. Co.) (No. 4-CB-4583) prior to its decision by the Board. The NLRB in its brief cites Local 107, Highway Truckdrivers and Helpers, 300 F.2d at 322 n.12, for the proposition that subsequently-decided cases may buttress the propriety of broad remedial orders. Our note there—that "[s]ubsequent to the order before us, the Board decided Highway Truck Drivers, Local 107 [E.A. Gallagher & Sons], 131 N.L.R.B.

The presence of these factors demonstrates that the defendant misplaces its reliance on our decisions in NLRB v. Local 830, Brewery and Beer Distributor Drivers, 281 F.2d 319 (3d Cir. 1960) and NLRB v. Building and Construction Trades Council of Delaware, 578 F.2d 55 (3d Cir. 1978), and on the Supreme Court's per curiam opinion in Communications Workers of America v. NLRB, 362 U.S. 479 (1960).

We stand unpersuaded by the defendant's argument that the NLRB unduly relied upon those adjudications that occurred years before this one, to find union proclivity to breach the Act. The principle that prior violations may support broad remedial orders remains well-settled in this court. See Local 107, Highway Truckdrivers and Helpers, 300 F.2d at 322. Nor should the mere remoteness in time of particular cases remove them from the Board's consideration. See, e.g., NLRB v. Local 3, International Brotherhood of Electrical Workers, 730 F.2d 870, 880-881 (2d Cir. 1984) (seven adjudications over twenty years justified a broad 8(b) (4) order).

In short, substantial evidence of union wrongdoing saturates the record and buoys the Board's inclusion of the "employees of Gross Metal Products, Inc. or any other employer" in its order.

Second, the NLRB's mandate that Local 115 cease and desist from "in any manner" violating §8(b)(1)(A) must rest

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No. 117, which also supports its conclusion"—intended no such holding. The NLRB in Highway Truckdrivers, in fact, highlighted "other recent cases" to demonstrate the union's proclivity to engage in unlawful secondary conduct. 130 N.L.R.B. 943, 951 n.17 (1961). But the Board's opinion did not cite G.A. Gallagher & Sons or other pending cases.

This observation, however, in no way precludes the Board from using evidence in the record of misconduct against other employers' employees simply because such facts may be operative in an undecided case. Furthermore, it leaves undisturbed our finding that the order here properly protected employees of employers besides Gross Metal Products.

upon either a historical proclivity to violate the Act or an egregious pattern of recent conduct. See Allegheny Pepsi-Cola Bottling Co. v. NLRB, 312 F.2d 529, 532 (3d Cir. 1962); Local 107, Highway Truckdrivers and Helpers, 300 F.2d at 322; NLRB v. Blake Construction Co., Inc., 663 F.2d 272 (D.C. Cir. 1981). The facts here evince both.

We find unsound the union's contention that overbreadth fatally flaws the Board's order since it proscribes lawless activity unrelated to its wrongdoing in this case. This logic would effectively extinguish broad remedial orders except where a defendant had committed every type of misconduct that §8(b)(1)(A) might forbid. To the contrary, the rule of Express Publishing Co. asks only whether the defendant's actions reasonably suggest a likelihood of future violations. The evidence justifies such a conclusion here.

IV.

The defendant also complains that the issuance of a broad order without prior notice of its scope violates due process. Since the union raises this issue for the first time in this litigation on appeal, however, we lack jurisdiction to decide it.

Section 10(e) of the Act provides that "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objections shall be excused because of extraordinary circumstances."

As the Supreme Court noted in International Ladies' Garment Workers' Union v. Quality Manufacturing Co., 420 U.S. 276, 281 n.3 (1975):

> The [defendant] failed to file a petition for reconsideration as permitted by Board Rules and Regulations §102.48(d) (1), 29 CFR §102.48(d) (1), that provides that any material error in the Board's decision may be asserted through a motion for "reconsideration, rehear-

> ing or reopening of the record." [It] therefore cannot assert its objection on appeal . .

See Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 665-666, rehearing denied, 459 U.S. 899 (1982); NLRB v. ARA Services, Inc., 717 F.2d 57, 69 (3d Cir. 1983). Although §10(e) nowhere requires the Board to respond, it does demand notice of objection. Accord Local 900, International Union of Electrical Workers v. NLRB, 727 f.2d 1184, 1192 (D.C. Cir. 1984). The statute emphasizes the "salutary policy . . . of affording the Board opportunity to consider on the merits questions to be urged on review of its order." Marshall Field & Co. v. NLRB, 318 U.S. 253, 256, rehearing denied, 318 U.S. 802 (1943).

Here the union objected to the ALJ's decision simply by reprinting excerpts from his opinion and reciting the litany "we except to the conclusion." Its companion brief placed three exceptions before the Board: that a broadly-worded order should not have been issued on the facts; that the ALJ should have accepted the proposed settlement stipulation; and that the ALJ erred by allowing Sheldon Gross to use notes during his direct testimony.[2] The first two points rested on the record's supposed failure to exhibit union proclivity toward wrongdoing and on policy grounds. The defendant nowhere pressed before the NLRB the reasons supporting its present due process argument. The union, moreover, proffers to us no "extraordinary circumstances" to excuse its failure to move for reconsideration by the Board. In the absence of any such circumstances, we cannot consider the due process claim.

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[2] The defendant has dropped this third issue before us.

v.

We will enforce the Board's order in full.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

Carol Los Mansmann
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3195

NATIONAL LABOR RELATIONS BOARD,
vs.
TEAMSTERS UNION LOCAL NO. 115, etc. et al.

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge,
BECKER, STAPLETON, MANSMANN, GREENBURG,
HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO,
ROTH, LEWIS, MCKEE, SAROKIN AND SEITZ*,
Circuit Judges.

The petition for rehearing filed by respondent in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

Carol Los Mansmann
Circuit Judge

*Senior Circuit Judge Seitz voted only as to panel rehearing.

AUG 31 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3195

NATIONAL LABOR RELATIONS BOARD

v.

TEAMSTERS LOCAL 115, etc., et al.

It is O R D E R E D that the motion for recall and stay of mandate is DENIED because no substantive right of the applicant will be affected by failure to grant the stay of mandate. This is without prejudice to the applicant's right to file a timely petition for writ of certiorari.

Carol Los Mansmann
Circuit Judge

Dated: OCT 02 1995

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

May 17, 1994

No. 93-3195

NATIONAL LABOR RELATIONS BOARD, Petitioner
v.
TEAMSTERS LOCAL 115, etc.
and
HAROLD FISHER, GERARD MCNAMARA AND JOCKO JOHNSON
(NLRB No. 4-CB-6756, 4-CB-6753, 4-CB-6668 and 4-CB-6527)

Present: MANSMANN, ROTH and SEITZ, Circuit Judges.

Motion by Respondent Local 115 to instruct the Special Master to take testimony and hear evidence, to continue hearings set to resume May 17, 1994, and to allow the Union an opportunity to engage in prehearing discovery under the Federal Rules of Civil Procedure.

Sent for the Court's information is a copy of the Court's 11-22-94 order granting Petitioner's motion for order of reference to a Special Master.

Mary Arnold
Deputy Clerk, 597-5019

ORDER

The foregoing motion is denied without prejudice to the merits of the motion if and when raised at an appropriate time.

By the Court,

Carol Los Mansmann
Circuit Judge

Dated: May 18, 1994
ma/cc: JFF
WGM
WW
NHB

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

July 13, 1994

No. 93-3195

NATIONAL LABOR RELATIONS BOARD, Petitioner
v.
TEAMSTERS LOCAL 115, et al.
(Agency #4-CB-6756, 4-CB-6753, 4-CB-6668, 4-CB-6527)

PRESENT: MANSMANN, ROTH and SEITZ,
Circuit Judges.

Motion by Respondents to dismiss civil contempt proceedings with memorandum in support to dismiss.

Angela Perricone
Deputy Clerk
597-1092

Petitioner's response due 7/18/94.

ORDER

The foregoing motion to dismiss is denied.

By the Court,

Carol Los Mansmann
Circuit Judge

Dated: Sep 2 1994
ap/cc: JFF WW
WEM NHB III

Supreme Court, U.S.
FILED
MAR 15 1996
CLERK

(3)

No. 95-949

In the Supreme Court of the United States

OCTOBER TERM, 1995

TEAMSTERS LOCAL 115, ETC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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LINDA SHER
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Deputy Associate General Counsel
WILLIAM MASCIOLI
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25 pp

QUESTIONS PRESENTED

The court of appeals, adopting the report and recommendation of the Special Master, adjudged petitioners to be in civil contempt for having violated the court's earlier judgment enforcing an order of the National Labor Relations Board. To guard against further violations of the judgment or the contempt adjudication, the court, among other things, prescribed, subject to the requirements of due process, prospective fines against petitioners for any future violations of the judgment or the contempt adjudication. The questions presented are:

1. Whether the Special Master erred in denying petitioners' motion to compel the pre-trial disclosure of the Board's witness affidavits and its investigative notes and summaries of witness interviews.

2. Whether the Special Master properly applied principles of agency law in finding that petitioners were responsible for the wrongful acts committed.

3. Whether the court of appeals' prescription of prospective fines for future violations of the court's judgment or its contempt adjudication rendered the contempt proceeding criminal in nature.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-949

TEAMSTERS LOCAL 115, ETC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 6-7), adopting the Special Master's report and recommendation that petitioners be held in civil contempt for violating the court's judgment of June 19, 1986, is unpublished, as is the court's subsequently entered contempt adjudication and purgation order. Pet. App. 1-5. The unpublished report and recommendation of the Special Master is set forth at Pet. App. 8-62.

JURISDICTION

The court of appeals' contempt adjudication and purgation order was entered on July 20, 1995. The court of appeals denied a petition for rehearing on August 31, 1995. Pet. App. 72. The petition for a writ of certiorari was filed on November 29, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 19, 1986, the court of appeals entered a judgment against Teamsters Local 115 (Union), enforcing a determination by the National Labor Relations Board (Board) that the Union had violated Section 8(b)(1)(A) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(1)(A), by committing numerous acts of violence and coercion against employees and company officials of Gross Metal Products, Inc., by threatening and assaulting employees of neutral employers, and by damaging property. Pet. App. 63-65, 71. Based on the "widespread and massive" character of the Union's violations, the Union's "established proclivity for such unlawful actions and the fact that the violence and threats here went beyond the [Charging Party's] employees and were directed at neutral employers and employees as well," the Board issued a broad order, requiring among other things that the Union, its officers, agents, and representatives cease and desist from:

> (a) Restraining or coercing employees of Gross Metal Products, Inc. *or any other employer* by (1) obstructing, blocking, and preventing ingress and egress of vehicles, employees and other persons from the premises of Gross Metal

> Products *or of any other employer*; (2) threatening employees or other individuals with violence or other reprisals; (3) assaulting or striking employees or other individuals or throwing or brandishing objects at them; (4) causing damage to vehicles or other property; (5) mass picketing, pushing, shoving, chasing, or spitting at employees or other individuals—because employees or other individuals have crossed or attempted to cross Respondent's picket lines.
>
> (b) *In any other manner* restraining or coercing employees of Gross Metal Products, Inc. *or any other employer* in violation of Section 8(b)(1)(A) of the Act.

Teamsters Local 115 (Gross Metal), 275 N.L.R.B. 1547, 1557 (1985) (emphasis added) (Pet. App. 9 n. 2). In its 1986 opinion enforcing the Board's order, the court of appeals stated that "the NLRB's [broad cease and desist order] must rest upon either a historical proclivity to violate the Act or an egregious pattern of recent conduct. The facts here evince both." Pet. App. 68-69 (citations omitted).

2. On May 4, 1993, the Board filed a petition with the court of appeals requesting that the petitioners be adjudged in civil contempt for engaging in conduct proscribed by the court of appeals' 1986 judgment. Pet. App. 10. By an order of reference dated November 22, 1993, the court of appeals appointed United States Magistrate Judge Tullio Leomporra to serve as a Special Master in this matter, providing specifically that he was to conduct proceedings

"[i]n accordance with the Federal Rules of Civil Procedure."[1]

On February 23, 1994, the Board filed its First Interrogatories and Request for Production of Documents "[p]ursuant to Rule[s] 34 [and 33] of the Federal Rules of Civil Procedure." See Petitioner National Labor Relations Board's First Request for Production of Documents at 1 (Feb. 23, 1994). In response, petitioners stated that they would provide the information in accordance with the self-executing discovery requirements of the Civil Justice Expense and Delay Reduction Plan of the Eastern District of Pennsylvania (Plan).[2] Petitioners' response acknowledged that "either side obviously has the right to file additional discovery requests after this exchange of information." Letter from Walt De Treux, Counsel for Teamsters Local 115, to Mascioli (Feb. 24, 1994).

On March 24, 1994, the Board sent petitioners its First Disclosure Statement, listing the names and last known addresses of all persons known to the Board who were likely to have information bearing on

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[1] The court's order of reference is set forth in the appendix, *infra*, 3a-5a.

[2] The Plan requires, in pertinent part, that all parties shall disclose:

§ 4:01 (A) the name and last known address of each person reasonably likely to have information that bears significantly on the claims and defenses, identifying the subjects of the information;

(B) a general description, including location, of all documents, data, compilations, and tangible things in the possession, custody, or control of that party that are likely to bear significantly on the claims and defenses.

the Board's allegations, identifying the specific labor dispute of which each was likely to have relevant knowledge. The Statement also disclosed the existence of affidavits taken by the Board, and of videotapes and incident reports—some of which were not in the Board's custody—that had been prepared by the charging parties or by their agents. See Petitioner National Labor Relations Board's First Pretrial Disclosure Statement at 1-6 (Mar. 24, 1994); see also Letter from William Mascioli, Trial Attorney, to Brainard and De Treux (Mar. 24, 1994) (undertaking to supply any additional responsive information "as we obtain it").

On April 12, 1994, in what was to be their sole request for discovery from the Board, petitioners sought all affidavits, correspondence, summaries or records of telephone conversations, summaries or records of personal conversations or interviews, and transcripts or summaries of investigations regarding each "witness" listed on the Board's disclosure statement.[3] Petitioners also sought any videotapes, audiotapes, or documentary evidence that the Board expected to present in support of its allegations. See Respondents' First Request for Production of Documents at 1-2 (Apr. 12, 1994). In response, the Board, on April 14, 1994, provided to petitioners all incident reports and photographs in its possession regarding the contempt allegations, and notified

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[3] The Plan does not require the voluntary disclosure of a witness list, and the Board's Statement was not such a list, contrary to petitioner's characterization of it (Pet. 3). Instead, the Statement complied with the Plan by identifying all individuals who were likely to have pertinent knowledge, regardless of whether the Board intended to call them to testify.

petitioners that it was in the process of duplicating all pertinent videotapes in its possession.[4] With regard to petitioners' request for affidavits and investigative notes and summaries, the Board stated that it would produce affidavits in accordance with its administrative practice, which mirrors the Jencks Act, 18 U.S.C. 3500,[5] but that it intended to assert work-product and other privileges as to the rest. See Letter from William Mascioli, Trial Attorney, to Brainard and De Treux at 1 (Apr. 14, 1994).

On April 22, 1994, petitioners moved the Special Master to compel the production of the Board's witness affidavits and investigative notes and summaries. The Special Master denied petitioners' motion to compel. In accordance with its April 14, 1994, representation that it would follow its administrative practice, the Board subsequently provided petitioners with copies of witnesses' affidavits after each witness testified on direct examination. Pet. App. 60.

On May 17, 1994, after the completion of four days of testimony, petitioners moved the court of appeals to stay the proceedings and to instruct the Special Master to continue the proceedings to permit them more time in which to engage in discovery. Pet. App. 11. The court denied petitioners' motion on May 18,

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[4] The Board provided the videotapes as soon as they were duplicated.

[5] Section 102.118(b)(1) of the NLRB Rules & Regulations, 29 C.F.R. 102.118(b)(1), provides that, after a witness has been called by the Board's General Counsel or by the charging party in an administrative hearing, the administrative law judge shall, upon the respondent's motion, order the production of any statement of the witness in the General Counsel's possession that relates to the subject matter of the witness's testimony.

1994. *Id.* at 74-75. On July 13, 1994, petitioners filed a motion with the court of appeals to dismiss the case on the ground that the Court's decision in *International Union* v. *Bagwell*, 114 S. Ct. 2552 (1994), invalidated the Special Master's proceedings. On September 2, 1994, the court denied the motion to dismiss. Pet. App. 76.

3. On October 12, 1994, the Special Master issued his report and recommendation that the Board's petition to adjudicate petitioners in civil contempt be granted. The Special Master found that "[t]he evidence is overwhelming that the Union engaged in a pattern of behavior that could hardly be classified as a 'technical or inadvertent violation.'" Pet. App. 61. Addressing petitioners' procedural defense that they had been deprived of due process by his refusal to enlarge the time for discovery, the Special Master found:

> The Union had adequate time to engage in discovery before the hearings commenced, but chose not to conduct any discovery. Instead, they asked the Special Master to order the Petitioner [Board] to produce witness statements made to Board investigators. When their motion to compel was denied they then motioned the Third Circuit to instruct the Special Master to allow more time for discovery. When this motion was denied they finally began issuing subpoenas, a year after the original contempt motion was filed and five months after the Special Master ordered discovery to continue.

Pet. App. 60.

With regard to petitioners' claim that the Union could not be held liable for the misconduct of its

members, the Special Master found that, although there was no proof of Union authorization of the misconduct, "it was a continuing pattern of misconduct * * * which the Union did not take any steps to prevent." Pet. App. 51, 54, 55-56, 57, 58. Accordingly, the Special Master found the Board had established agency under the common law principles operative under the NLRA. The Special Master also found that because of the Union's constant supervision of the picket lines, the court could infer actual knowledge after the fact, establishing liability under the "knowing tolerance" standard of *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966). Pet. App. 51-52, 54, 55-56, 57, 58.

4. On January 13, 1995, the court of appeals issued its order adopting the Special Master's report and recommendation that petitioners be held in civil contempt for violating the Court's June 19, 1986 judgment. Pet. App. 6. On July 20, 1995, following briefing on the issue of appropriate sanctions, the court of appeals issued its contempt adjudication. Pet. App. 1.

In its purgation order, the court of appeals provided, among other things, that:

> In order to assure against further violations of the judgment of this contempt adjudication, the Court hereby imposes, subject to the requirements of due process of law, a prospective noncompliance fine of $10,000 against Local 115 for each and every future violation of the judgment or this adjudication, and a further fine of $1,000 per day for each day the Court finds such violation to have continued; and imposes a prospective fine of $1,000 per violation and $500 per day against each

officer, agent, attorney, representative or any other person who, with notice or knowledge of the judgment or this contempt adjudication, acts in concert or participation with Local 115 to violate the judgment or this adjudication.

Pet. App. 4-5.

ARGUMENT

1. Petitioners contend (Pet. 8-9) that the Board "succeeded in claiming that it is not bound by the Federal Rules of Civil Procedure" in the contempt proceedings. Far from asserting such a claim, the Board, as shown above, complied with the Federal Rules of Civil Procedure, including those pertaining to discovery, and with the local rules of the Eastern District of Pennsylvania from the time the order of reference issued establishing their applicability to this proceeding.[6] As the Special Master correctly

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[6] Petitioners contend that "this Court has not specifically addressed whether the discovery provisions of the Federal Rules of Civil Procedure apply to injunctive and/or contempt proceedings brought by the National Labor Relations Board in the federal courts." Pet. 8 (footnote omitted). This assertion fails to note that the Board litigates injunction and contempt proceedings in both the federal district courts and the courts of appeals. The Federal Rules, however, apply only in the district courts. Fed. R. Civ. P. 1. Thus, petitioners' reliance (Pet. 8) on cases involving injunction proceedings in the district courts pursuant to 29 U.S.C. 160(j) and (*l*) is misplaced, inasmuch as those are, by statute, district court proceedings. In contrast, where as here an appellate court has enforced a Board order under 29 U.S.C. 160(e), proceedings involving contempt of such an order arise in the court of appeals. For that reason, the Federal Rules of Civil Procedure do not automatically apply to such proceedings. Here, it was the court of appeals' order of reference that established the Fed-

noted, discovery under the federal rules was available in the proceedings before him, but petitioners failed to make use of it. Pet. App. 60.

Thus, the only real issue raised by petitioners' claim is whether the Special Master erred in accepting the Board's position that its witness statements and affidavits were not subject to pre-trial discovery and in denying petitioners' motion to compel production. That fact-bound issue does not warrant review by this Court. In any event, it is clear that the Special Master acted well within his authority in denying the motion to compel production.[7] Moreover, as the Special Master found, that ruling did not prejudice the Union's defense because, in accordance with the Board's administrative practice, "[a]fter direct examination of each Board witness the Union was presented a copy of the witnesses statement to the Board, if one was made, and given whatever time [it]

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eral Rules as governing the proceedings before the Special Master.

[7] The statements at issue were clearly prepared in contemplation of litigation and were entitled to protection against discovery as work-product within the meaning of Rule 26(b)(3). See *In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (3d Cir. 1979); *Brock* v. *Frank V. Panzarino, Inc.*, 109 F.R.D. 157, 159 (E.D.N.Y. 1986) (regarding similar statements taken by agents of the Department of Labor investigating Fair Labor Standards Act violations). It is well established that such statements are exempt from discovery under Rule 26(b)(3) in the absence of a showing of substantial need and undue hardship. See *Hickman* v. *Taylor*, 329 U.S. 495, 508-511 (1947); *NLRB* v. *Trades Council*, 131 L.R.R.M. (BNA) 2022, 2024-2025 (3d Cir. 1989) (on contempt); *Alltmont* v. *United States*, 177 F.2d 971, 976 (3d Cir.), cert. denied, 339 U.S. 967 (1950); *NLRB* v. *Laborers, Local 1140*, 78 L.R.R.M. (BNA) 2635, 2637 (8th Cir. 1971) (on contempt).

needed to prepare for cross examination." Pet. App. 60.

2. Petitioners contend (Pet. 9) that, under *United Bhd. of Carpenters* v. *United States*, 330 U.S. 395, 403 (1947), and *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 739 (1966), a union may not be held responsible for the illegal activities of its members unless there is clear proof that it "actually participated, gave prior authorization or ratified such acts after actual knowledge of their perpetration;" that is, that the union "participated actively or by knowing tolerance" in the misconduct. That standard, petitioners assert, was not met here.

Petitioners' reliance on those cases is misplaced, because they involved the standard for agency in Section 6 of the Norris-LaGuardia Act, 29 U.S.C. 106,[8] which is more stringent than the common law principles of agency which Congress made controlling for cases under the National Labor Relations Act.[9] See *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 212, 216-217 (1979); *United Mine Workers* v. *Gibbs*, 383 U.S. at 736 & n.24. Petitioners do not claim that they could not properly be held responsible

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[8] That Section provides that no union "shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

[9] Section 2(13) of the NLRA, 29 U.S.C. 152(13), provides: "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

for the illegal conduct of union members under the common law agency principles which govern liability under the NLRA. In any event, the Special Master's findings are sufficient to establish liability even under the more stringent Norris-LaGuardia test. Contrary to petitioners' contention (Pet. 10), the Special Master did not find the Union "strictly accountable for any failure in its efforts to maintain order," but rather found that there was a proven pattern of misconduct on picket lines that the Union had established and over which the Union exercised steady oversight. In those circumstances, the Special Master could infer that the Union had actual knowledge of the misconduct after the fact, which would establish liability under the "knowing tolerance" standard of *Gibbs*.

3. Petitioners argue (Pet. 10-12) that the Court should grant certiorari in this case to afford the Court an opportunity to clarify whether *International Union* v. *Bagwell*, 114 S. Ct. 2552 (1994), applies to a contempt proceeding at this stage, namely, one in which the court announces a prospective fine schedule to deter future contumacies, but does not actually assess any such fines. This argument fails because the particular concerns which led to the Court's establishment of constitutional protections for accused contemnors situated similarly to the contemnor in *Bagwell* are not present in this case.

Contempt generally comprises a three-stage process: (1) issuance of a court order; (2) disobedience of that court order, leading to a second court order finding the recalcitrant party in contempt, ordering that party to purge itself of its contempt, and establishing a specified prospective fine schedule or

other prospective sanction for failure to comply; and (3) exaction of the threatened fine or other coercive sanction if the purgation conditions are not fulfilled. *NLRB* v. *Blevins Popcorn Co.*, 659 F.2d 1173, 1184 (D.C. Cir. 1981); Owen Fiss, *Injunctions* 763-764 (1972).

Bagwell involved a third-stage contempt proceeding. There, a month after enjoining the union from conducting unlawful strike-related activities against certain mining companies, a Virginia trial court held a contempt hearing, fined the union for its disobedience, and announced that it would fine the union $100,000 for any future violent breach of the injunction and $20,000 for any nonviolent infraction. In seven subsequent contempt hearings, the court found the union in contempt for more than 400 separate violations of the injunction, many of them violent, and levied over $64 million in fines against the union. Approximately $12 million of the fines were to be paid to the companies, and the remaining roughly $52 million were to be paid to the Commonwealth and the two counties most heavily affected by the unlawful activity. While appeals from the contempt orders were pending, the union and the companies settled the underlying labor dispute, agreed to vacate the contempt fines, and jointly moved to dismiss the case. The court granted the motion to dismiss, dissolved the injunction, and vacated the $12 million in fines payable to the companies. Reiterating its belief that the remaining $52 million owed to the Commonwealth and the counties were coercive, civil fines, the trial court refused to vacate those fines, concluding that they were "payable in effect to the public." *Bagwell*, 114 S. Ct. at 2555-2556.

Acknowledging that the line between coercive civil contempt fines and criminal sanctions was difficult to define, the Court concluded that the fines challenged in *Bagwell* were criminal in nature. The Court explained:

> [T]he Virginia trial court levied contempt fines for widespread, ongoing, out-of-court violations of a complex injunction. In so doing, the court effectively policed petitioners' compliance with an entire code of conduct that the court itself had imposed. The union's contumacy lasted many months and spanned a substantial portion of the State. The fines assessed were serious, totalling over $52,000,000. Under such circumstances, disinterested factfinding and even-handed adjudication were essential, and petitioners were entitled to a criminal jury trial.

114 S. Ct. at 2562 (footnote omitted).

This case is distinguishable from *Bagwell*. First, it has gone no further than stage two of the contempt process. The court of appeals adjudicated petitioners in contempt and ordered that they take certain action in purgation. To forestall future violations, the court imposed a schedule of "prospective non-compliance fine[s]." Pet. App. 4. However, by providing that, in the event of future violations, the announced fines would be collected "subject to the requirements of due process," *ibid.*, the court has left open until that later stage of the contempt proceeding the question of what process is due. Petitioners thus will have an opportunity at that time—if the circumstances arise—to advance their contentions (Pet. 11-13) that the manda-

tory fine schedule is unduly harsh and that due process requires a trial by jury.[10]

Second, the *Bagwell* Court did not hold that prospective fines are inherently criminal in nature, or that they can never be enforced in a civil contempt proceeding. It merely "decline[d] to conclude that the mere fact that the sanctions were announced in advance rendered them coercive and civil as a matter of constitutional law." 114 S. Ct. at 2562. Although the Court went on to hold that the particular fines before it were criminal in nature, it did so because "[o]ther considerations convince [it] that the fines challenged here [were] criminal." *Ibid.* Among those considerations was a concern that the state court judge, who had issued the original injunction, had become incapable of disinterested fact-finding, because of the many roles he had been called upon to play in the proceedings, and that the fines, which totalled $52 million, were a serious contempt sanction that would ordinarily require a jury trial. See 114 S. Ct. at 2562 & n.5. Those factors are not present here. Indeed, no fines have, as yet, been assessed here, and

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[10] Petitioners' contention (Pet. 13) that the discovery feature of the court's purgation order is "unwarranted and unconstitutional" is also premature. That order provides that the Board "may obtain discovery" from the Union and others, "in the manner provided by the Federal Rules of Civil Procedure, upon any matter reasonably related to compliance with the judgment or this contempt adjudication." However, the order safeguards against Board abuse of its discovery authority by further providing that, "should a dispute arise between the parties respecting such discovery, upon the motion of either party, the Court shall appoint a special master, with such duties and powers as the Court shall specify, to supervise the discovery." Pet. App. 4.

petitioners, by conforming their future conduct to the requirements of law, are well positioned to ensure that none will.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3195

(NLRB #4-CB-6756, 4-CB-6753, 4-CB-6668 AND 4-CB-6527)

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TEAMSTERS LOCAL 115, A/W INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,

-AND-

HAROLD FISHER, GERALD MCNAMARA,
AND JOCKO JOHNSON,
ADDITIONAL RESPONDENTS

[Filed September 30, 1993]

ORDER

Present: MANSMANN, ROTH and SEITZ,
Circuit Judges.

Motion by Petitioner for Order of Reference to a Special Master *and* form of order,

/s/ ANGELA PERRICONE
Angela Perricone
Deputy Clerk 597-3080

The foregoing Motion is granted.

By the Court,

/s/ Carol Los Mansmann
CAROL LOS MANSMANN
Circuit Judge

Dated: November 22, 1993

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-3195

NATIONAL LABOR RELATIONS BOARD
PETITIONER,

v.

TEAMSTERS LOCAL 115, A/W INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,
RESPONDENT,

-AND-

HAROLD FISHER, GERALD MCNAMARA,
AND JOCKO JOHNSON,
ADDITIONAL RESPONDENTS IN CONTEMPT.

[Filed September 27, 1993]

Present: MANSMANN, ROTH and SEITZ,
Circuit Judges.

ORDER

The national Labor Relations Board, having filed its petition praying for an adjudication in civil contempt and for other civil relief, the respondents

having filed answers thereto, and the Court being of the opinion that it is appropriate to designate a Special Master, it is

ORDERED that *Magistrate Judge Tullio Leomporra* be and hereby is designated Special Master to take testimony and hear evidence with respect to the issues raised by the pleadings, and the Clerk shall forthwith furnish the Master with a copy of this order; and it is

FURTHER ORDERED that the Master shall have authority, powers and duties as follows:

1. To hold such hearings as may be reasonably necessary to obtain oral or documentary evidence from witnesses made available by the parties, or under the compelling process of the Master. Such hearings may be held at such place or places as the Master may deem appropriate.

2. To engage a qualified reporter to take and transcribe the testimony adduced at such hearings. Pending further order of the Court with respect to taxation and assessment of costs, the reporter's charges, when duly billed for, shall be paid by the Board, in the first instance.

3. In accordance with the Federal Rules of Civil Procedure, to regulate all proceedings in the hearings before the Master and to do all acts and take all measures necessary or proper for the performance of the Master's duties under this order. The Master may conduct such pretrial proceedings as may be appropriate to consider the simplification of the issues herein, including the possibility of obtaining admissions of facts and documents, and take such other actions which may aid in the disposition of the reference, including the entertainment and disposition of motions pursuant to the rules regulating discovery,

motions for summary judgment, and motions to amend or supplement the pleading, in accordance with the pertinent provisions of the Federal Rules of Civil Procedure.

4. As soon after the conclusion of the hearing as practicable, the Master shall file with the Clerk of the Court the transcript of the proceedings and of the evidence, and the original exhibits, together with the Master's report thereon and recommendations as to findings of Fact and conclusions of law; a copy of said report and recommendations shall at the same time be served on the parties. The Master may require the parties to submit, prior to the filing of this report, proposed findings, objections to proposed findings, and briefs, and it is

FURTHER ORDERED that

5. Final assessment and allocations of all costs, fees, and expenses involved including counsel fees, are reserved for further order of the Court.

6. On filing with the Clerk of the Court of the Master's report and recommendation, the transcript of the proceedings and the original exhibits, the Clerk shall forthwith mail to all parties notice thereof. Within twenty (20) days after such notice, any party may file with this Court and serve on the other party written objections thereto.

BY THE COURT,

/s/ Carol Los Mansmann
CAROL LOS MANSMANN
Circuit Judge

DATED: November 22, 1993